No. 12572

United States
Court of Appeals
for the Ninth Circuit.

JOHN D. ROSS, Sheriff of Santa Barbara County, California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

Transcript of Record

Appeal from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

DAVID S. LICKER,
District Attorney of the County of Santa Barbara,

VERN B. THOMAS,
Assistant District Attorney,
Courthouse,
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LOREN MILLER, and
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129 West 3rd St.
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Los Angeles 13, Calif.

ELIZABETH MURRAY,
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Santa Barbara, Calif.

In the District Court of the United States of America, Southern District of California, Central Division.

No. 10586-C

PETITION FOR WRIT

In re:
APPLICATION OF SYLVESTER MIDDLEBROOKS, JR. FOR A WRIT OF HABEAS CORPUS.

To the Honorable Judges of the United States District Court, Southern District of Calilfornia, Central Division:

The petition of Attorney Ben Margolis on behalf of Sylvester Middlebrooks, Jr., respectfully shows:

I.

That the said Sylvester Middlebrooks, Jr., hereinafter referred to as Middlebrooks, is unlawfully imprisoned, detained and restrained of his liberty by the Sheriff of Santa Barbara County in the City of Santa Barbara, County of Santa Barbara, State of California, by virtue of a warrant for extradition signed by the Honorable Earl Warren as Governor of the State of California.

II.

That the said imprisonment, detention and restraint are illegal, and that the illegality thereof

consists in this, to wit: (1) The purported conviction and sentence upon which the said demand for extradition was based is void in that the said conviction [2*] was entered by the Superior Court of Bibb County, State of Georgia, at a time when the court did not have jurisdiction over the prisoner or to render a judgment against him because the court was not fully constituted and acted outside of and in excess of its jurisdiction in the following:

(a) That the said Middlebrooks, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, was denied counsel, a speedy trial, a fair trial, a public trial, or in fact any trial in that he was arrested at the age of seventeen in the month of June or July, 1934, and was held in the local jail without charges and without any legal counsel from the time of arrest until February 8, 1935, at which time the following took place: On the morning of February 8, 1935, the jailor told him to get ready for trial. About 15 or 20 minutes later he was taken by the jailor to the courtroom. When he arrived the only ones in the courtroom were the Judge of the Superior Court of Bibb County, W. A. Clell, and the sheriff of Bibb County, A. M. Stephensen. Immediately after he entered the courtroom, the said judge and sheriff began talking together in low tones and Middlebrooks could not hear what they were saying. After they had finished their conversation the said judge called Middlebrooks to the bench and said,

*** Page numbering appearing at top of page of original certified Transcript of Record.**

"Don't you know that you can't go around breaking the laws of Georgia." Middlebrooks protested that he had not broken any laws. The said judge said, "I could give you twenty (20) years on the 5 charges of burglary." Middlebrooks protested that he had already been tried for the same five charges and sent to the reformatory. He asked for a lawyer and a jury trial. The said judge became very angry and again said that he could sentence him (Middlebrooks) to five years of hard labor in the Georgia State penitentiary [3] on each count. The said judge then pronounced sentence of five years on Middlebrooks, one for each count. Middlebrooks was never served with nor were any charges whatsoever read to him.

(b) The judgment and sentence imposed by the State of Georgia on or about the 8th day of February, 1935, against Middlebrooks violated the due process clause of the Fourteenth Amendment in that it imposed upon Middlebrooks cruel and inhuman punishment; he was committed to a "chain gang" where in accordance with the practices theretofore and thereafter existing he and others who were and are so committed were the victims of cruel, barbaric and inhuman treatment at the hands of jailors in the following respects, among others: They were forced to work on the average of 16 to 18 hours each and every day with the exception of Sunday doing the most strenuous and heaviest type of manual labor such as breaking rocks with heavy sledge hammers

and lifting and carrying heavy articles, many times in very hot weather, without any rest period whatever except a short period for lunch, with the result that as high as twelve out of fourteen men on a single detail have collapsed and succumbed physically to the fiendish inhuman work pace set.

They were locked in the "bull pen," their quarters at all times except work hours, which quarters were unsanitary, inadequately sized for the number of men confined; it consisted of one room with the only toilet facilities being a large "oil" can located in a corner of their sleeping room, which can leaked causing urine with its reeking stench to run under the beds of men attempting to sleep; it was infested with rats, lice and vermin of all types. [4]

There was no recreation or religious services of any type offered to them. For the slightest failure or inability to maintain the inhuman work pace set forth above they were put in "stocks" as punishment; a stock is a frame of timber with holes in which the hands and feet are confined in a tortured position so as to temporarily cripple the men so confined; as a result, on removal they had to be dragged to the "bull pen" unable to walk and there to lay for a day or two receiving medical care only from inexperienced, uneducated fellow prisoners with no medical equipment. Middlebrooks saw a man actually die as a result of this medieval, fiendish torture process.

They were put unclothed in a "sweat box" as punishment; this torture chamber was about six

feet long and three feet wide with no light and no window; they were kept unclothed in this box for different periods up to two weeks in solitary confinement subsisting on a diet of bread and water with no one to talk to except themselves, and with only a bucket set in a corner as toilet facilities.

They were forced to wear stripes, heavy leg chains and on occasion "picts" which were iron bands put around their ankles of such a nature that if a prong on one leg would strike the other leg it would cause severe and disabling injury.

They were fed unhealthy, indigestible, half-cooked food that contained foreign matter such as rat's dung, dead cockroaches and other insects; the food was of such a nature that rats caught by the men and fried were preferable.

They were constantly verbally abused by their jailors' using terms such as "sonofabitch," "bastards" and other like terms.

Their guards carried guns and on many occasions threatened [5] death while pointing guns at them, with no provocation whatsoever and with the guards having knowledge that there would be no penalty assessed if he caused death to a prisoner. They were savagely beaten by sadistic guards on many occasions, the guards using wooden clubs and leather whips on their backs and legs causing bruises and cuts.

(2) That for this court to render a judgment that will allow the agents of the State of Georgia

to take Middlebrooks into custody would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that this would constitute state action of the State of California and would directly cause his return to the State of Georgia to effectuate a sentence of cruel and inhuman punishment and a sentence void by reason of the denial of due process because of the facts hereinabove set forth and incorporated here by reference as if fully set forth; further, he would be in grave danger of violence and possible loss of his life at the hands of the officers and agents of the State of Georgia, for he, a Negro, has challenged the State of Georgia, its "chain gang" brutality which is permeated by hatred of the Negro, and its open, vicious and deadly programs of terrorism against the Negro citizen.

(3) The action of the Governor of the State of California in issuing the warrant of extradition, and officers of the Sheriff's Department of Santa Barbara, under said warrant, are contrary to the prohibitions of the Fourteenth Amendment to the Constitution of the United States, in that they are actions of the State in aid of a violation of constitutional rights guaranteed to Middlebrooks by the due process clause of the federal Constitution.

(4) That Middlebrooks' presence in the State of California is not due to his own voluntary act but to compulsion in that the United States Army transported him involuntarily to Camp Cooke in [6] California from another state.

(5) That Middlebrooks was once in jeopardy for the same crimes for which he was sentenced and convicted on or about the 8th day of February, 1935, in that on or about the 7th day of January, 1932, he was tried and convicted on the same charges that he was tried and convicted of on the 8th day of February, 1935.

(6) That prior applications for Writs of Habeas Corpus were made to the following California courts: the Superior Court, the District Court of Appeal, the Supreme Court; that each of these applications were denied.

(7) That an application for a stay of execution of the denial of Writ of Habeas Corpus and for a Stay of Execution of that portion of the Governor's warrant of arrest authorizing the turning over of the said Middlebrooks to the duly authorized agents of the State of Georgia was made to the Supreme Court of California and the Supreme Court of the United States for the purpose of allowing counsel for the said Middlebrooks to file a Petition for Writ of Certiorari to the Supreme Court of the United States; that each of these applications was denied.

Wherefore, your petitioner prays that a Writ of Habeas Corpus may be granted, directed to the said Sheriff of Santa Barbara County, commanding him to have the body of Sylvester Middlebrooks, Jr., before this Honorable Court at a time and place therein to be specified, to do and receive what there shall

be considered by this Honorable Court concerning said Sylvester Middlebrooks, Jr., together with the time and cause of his detention, and said Writ; and that he, the said Sylvester Middlebrooks, Jr., may be restored to his liberty.

Dated: November 21, 1949.

/s/ BEN MARGOLIS,
Petitioner on behalf of Sylvester Middlebrooks, Jr.
[7]

Duly verified.

[Endorsed]: Filed Nov. 21, 1949. [8]

[Title of District Court and Cause.]

No. 10586-C

ORDER FOR ISSUANCE OF WRIT OF HABEAS CORPUS

Upon reading the verified petition of Ben Margolis, Esquire, in the above-entitled matter, and good cause appearing therefor, it is the order of this Court that the Clerk is hereby ordered and directed to issue a Writ of Habeas Corpus directed to the Sheriff of the County of Santa Barbara, State of California, commanding him to produce the body of Sylvester Middlebrooks, Jr., on the 13th day of December, 1949, at the hour of 10 o'clock, a. m., of said date in the court room of Judge Carter, Federal Bldg., Los Angeles, Calif. to do and receive then and there what there shall be considered concerning said Sylvester Middlebrooks, Jr.

Dated: This 22 day of November, 1949.

/s/ JAMES M. CARTER,
District Judge.

[Endorsed]: Filed Nov. 2, 1949. [9]

United States District Court, Central Division, Southern District of California.

HABEAS CORPUS

The President of the United States of America

To Sheriff of the County of Santa Barbara, Greeting:

You are hereby commanded, that the body of Sylvester Middlebrooks, Jr. by you restrained of his liberty, as it is said detained by whatsoever names the said Sylvester Middlebrooks, Jr. may be detained, together with the day and cause of his being taken and detained, you have before the Honorable James M. Carter, Judge of the United States District Court in and for the Southern District of California, at the court room of said Court, in the City of Los Angeles, at 10 o'clock a. m., on the 13th day of December, 1949, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable James M. Carter, United States District Judge at Los Angeles, California this 22 day of November, A. D. 1949.

EDMUND L. SMITH,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: Filed Dec. 20, 1949. [10]

[Title of District Court and Cause.]

Return by John D. Ross, Sheriff of Santa Barbara County, California.

To the Honorable James M. Carter, Judge of the United States District Court in and for the Southern District of California, Central Division:

In obedience to the writ of habeas corpus, hereto annexed, I do hereby certify and return to the Court as follows:

I.

That I am the duly elected and acting Sheriff of Santa Barbara County, California, and that before the said writ of habeas corpus was served upon and came to me, the said Sylvester Middlebrooks, Jr., also known as Sylvester Middlebrooks, was committed to my custody on the 21st day of September, 1949, and that he now is detained at the Santa Barbara County Jail by virtue of a certain governor's warrant issued by the Honorable Earl Warren, Governor of the State of California, a true photostatic copy of which warrant is hereto annexed and made a part hereof and marked Exhibit 1, the original of which I also produce. [12]

II.

That I, John D. Ross, Sheriff of Santa Barbara County, California, do make the further return and allege that I am informed and upon such information and belief, allege that the aforementioned war-

rant of the Governor of California, referred to as Exhibit 1, was issued pursuant to the receipt by the Governor of California of a written demand by the Honorable Herman E. Talmage, Governor of the State of Georgia, certified by him as authentic, for the extradition of Sylvester Middlebrooks, Jr. as a fugitive from justice from the State of Georgia, and also the receipt from the Governor of the State of Georgia, certified by him as authentic, of accompanying written documents, including indictment, judgment of conviction against Sylvester Middlebrooks, Jr., and other supporting papers, a true photostatic copy of such demand and accompanying written documents being annexed hereto and made a part of this return and marked Exhibit 2.

III.

That I, John D. Ross, Sheriff of Santa Barbara County, California, do make the further return and allege that I have no information or belief on the subject sufficient to enable me to answer the allegations of Paragraphs I, II (1), (a), (b), (2), (3), (4), (5), and (7) of the petition for a writ and placing my denials on that ground, deny, generally and specifically, each and every allegation in said paragraphs contained.

IV.

That I, John D. Ross, Sheriff of Santa Barbara County, California, do make the further return that the petition for a writ does not state facts sufficient to constitute a cause of action against this respon-

dent. Your attention is respectfully directed to the Memorandum of Points and Authorities in Opposition to the Petition for Writ of Habeas Corpus filed on behalf of respondent with respect to the points of law involved. [13]

Dated this 16th day of December, 1949.

/s/ JOHN D. ROSS,
Sheriff of Santa Barbara
County, California.

Duly verified.

EXHIBIT 1

State of California
Executive Department

The People of the State of California, to any Sheriff, Constable, Marshal, or Policeman of this State, Greeting:

Whereas, it has been represented to me by the Governor of the State of Georgia that Sylvester Middlebrooks stand — charged with the crime of burglary (5 counts) committed in the County of Bibb, in said State, and that he fled from the justice of that State, and has taken refuge in the State of California, and the said Governor of Georgia having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said Sylvester Middlebrooks to be arrested and delivered to C. J. Sorrells and/or L. W. Howard and/or S. W. Roper, who is authorized to receive

him into his custody and convey him back to the said State of Georgia, and whereas, the said representation and demand is accompanied by a copy of indictment and supporting papers certified by the Governor of the State of Georgia to be authentic, whereby the said Sylvester Middlebrooks is charged with said crime; and it satisfactorily appearing that the representations of said Governor are true, and that said Sylvester Middlebrooks is a fugitive from the justice of the aforesaid State, you are, therefore, required to arrest and secure the said Sylvester Middlebrooks wherever he may be found within this State, and to deliver him into the custody of said C. J. Sorrells and/or L. W. Howard and/or S. W. Roper, to be taken back to the State from which he fled, pursuant to the said requisition, he, the said C. J. Sorrells and/or L. W. Howard and/or S. W. Roper, defraying all costs and expenses incurred in the arrest and securing of the said fugitive.

In witness whereof, I have hereunto set my hand and caused the Great Seal of the State to be affixed, this the 13th day of September, in the year of our Lord one thousand nine hundred and Forty-nine.

/s/ Earl Warren,
Governor of the State of California.

By the Governor:

[Seal] /s/ FRANK W. JUDSON,
Secretary of the State of California.

By /s/ CHAS. J. JAGERT,
Deputy Secretary of State.

EXHIBIT 2

The State of Georgia

Executive Department

The Governor of the State of Georgia

To His Excellency, the Governor of California:

Whereas, it appears by the annexed documents, which are hereby certified to be authentic, that Sylvester Middlebrooks stands charged with the crime of Burglary (5 counts) committed in the County of Bibb in this State, and it has been represented to me that said Fugitive from Justice has fled from the justice of this State, and has taken refuge in the State aforesaid;

Now, therefore, pursuant to the provision of the Constitution and Laws of the United States, in such cases made and provided, I do hereby request that the said Fugitive from Justice be apprehended and delivered to C. J. Sorrells and/or L. W. Howard and/or S. W. Roper, who is hereby authorized to receive and convey the said Fugitive from justice to the State of Georgia, there to be dealt with according to law.

In testimony whereof, I have hereunto set my hand, and caused the Great Seal of State to be affixed, at the Capitol in the city of Atlanta, this 23rd day of February A. D., 1949, and of the Inde-

pendence of the United States of America, the One Hundred and Seventy-three.

By the Governor:

/s/ HERMAN E. TALMADGE,
Governor.

[Seal] /s/ BEN W. FORTSON,
Secretary of State.

State Board of Corrections
Atlanta, Georgia

February 23, 1949

To His Excellency, Herman Talmadge, Governor.

Sir:

The petition of the State Board of Corrections, by its Chief Clerk, Robert J. Carter shows as follows:

That Sylvester Middlebrooks was convicted at the February (1935) term(s), Bibb County Superior Court(s), State of Georgia, a Court (or Courts) having jurisdiction thereof, of Burglary (5 counts) and was sentenced thereupon by the Hon. W. A. McClellan, Judge presiding, to One to One year in each of Five (5) Counts, one to follow the other in the penitentiary of Georgia.

By virtue of said sentence(s) the said Sylvester Middlebrooks was received in the penitentiary February 8th, 1935 and while confined in said penitentiary escaped from Walton County Public Works Camp, Monroe, Georgia, a branch of the Georgia penitentiary, on July 13, 1939 and fled the State and is now a fugitive from justice and has been recaptured and is being held by Police Department, Camp Cooke, California under the name of Sylvester Middlebrooks.

Copies of the original indictment(s) and sentence(s) of the said Sylvester Middlebrooks are hereto attached.

Your petitioners further show that the said Sylvester Middlebrooks is not wanted in this State for the purpose of collecting a debt, nor for any private purpose whatsoever, but solely that he may brought back and again confined in the Georgia penitentiary to complete the terms of his sentences as imposed by the presiding Judge, and the ends of justice require that he be returned.

Wherefore, your petitioners pray that requisition may be issued upon His Excellency the Governor of California for a warrant of extradition that the said Sylvester Middlebrooks may be returned to the State of Georgia, and that C. J. Sorrells and/or L. W. Howard and/or S. W. Roper be appointed agent of this State for the purpose of bringing back the said Sylvester Middlebrooks that he may be again confined in the Georgia Penitentiary.

Respectfully submitted,
State Board of Corrections,

/s/ ROBERT J. CARTER,
Chief Clerk.

Sworn to and subscribed before me this 23rd day of February, 1949.

/s/ J. L. GRIFFITH,
Notary Public, Georgia, State at Large.

My commission expires 2-24-49.

Georgia, Fulton County—ss.

I, R. E. Warren director of the State Board of Corrections, certify over my official hand and seal that Robert J. Carter is the duly appointed and acting chief clerk of the State Board of Corrections and is in charge of the records of said body, and that he as such chief clerk has the right to sign applications for the extradition of prisoners who are wanted by the State of Georgia for escape.

Witness my hand and official signature this the 23rd day of February 1949.

/s/ R. E. WARREN,
Director, State Board of
Corrections.

Georgia, Fulton County—ss.

I, Robert J. Carter do certify that I am the duly appointed and acting chief clerk of the State Board of Corrections, and that the above attestation subscribed to by R. E. Warren as director of said board is sufficient and in due form of law, and that his signature thereto is genuine.

Witness my hand and official signature, this the 23rd day of February, 1949.

/s/ ROBERT J. CARTER,
Chief Clerk, State Board of
Corrections.

Georgia, Fulton County—ss.

I, Ben W. Fortson, Jr. secretary of state for the State of Georgia, I do hereby certify that the attestations, subscribed to by R. E. Warren as director of the State Board of Corrections, and Robert J. Carter as chief clerk of the State Board of Corrections, are sufficient and in due form and, therefore, all due faith, credit and authority is and ought to be had and given to these attestants as such.

In testimony whereof, I have here unto set my hand and affixed the seal of my office, at the capitol in the city of Atlanta, this 23rd day of February, in the year of our Lord, one thousand nine hundred and forty-nine, and of the independence of the United States of America the one hundred and seventy-second.

[Seal] /s/ BEN W. FORTSON, JR.,
Secretary of State.

INDICTMENT

No. 8-A

State of Georgia, Bibb County.

The Grand Jurors, selected, chosen and sworn for the County of Bibb to-wit:

1. C. L. Bowden, Foreman. Excused
2. Louis Funkenstein
3. R. R. Barrow
4. David S. Jones

5. John E. Wilson
6. J. Warren Timmerman. Excused
7. M. E. Everett. Excused
8. F. R. Happ. Excused
9. E. L. Cox
10. Geo. W. Alexander
11. Julian S. Lewis
12. L. A. Shirley
13. R. Fleming Johnson
14. H. N. Mitchell
15. W. F. Houser
16. C. W. Buchanan
17. C. A. Harris
18. S. R. Shi, excused.
19. McD. Nisbet
20. S. S. Chandler
21. A. B. Lee
22. H. G. Hollingsworth
23. J. T. McGehee

in the name and behalf of the citizens of Georgia, charge and accuse Sylvester Middlebrooks, Jr., hereinafter referred to as the accused, of the County and State aforesaid, with the offense of Burglary.

For that the said accused on the 14th day of September, in the year Nineteen Hundred and Thirty One, in the County aforesaid did then and there unlawfully and with force and arms feloniously break and enter into the dwelling house of A. W. McClure with intent to commit a larceny, and after so breaking and entering, did then and therein, unlawfully,

privately, wrongfully, and fraudently take and carry away therefrom with intent to steal the same, two lady's solitaire diamond rings, one lady's wedding ring, one lady's open face gold watch, and one lady's hunting case watch and one lady's diamond studded brooch, all of the value of $800.00, and of the personal goods of Mrs. A. W. McClure, contrary to the laws of said State, the good order, peace and dignity thereof.

Second Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further charge and accuse the said Sylvester Middlebrooks, Jr., with having omitted the offense of burglary; for that the said Sylvester Middlebrooks, Jr., in the County and State aforesaid, on the 14th day of July, 1932, did then and there unlawfully and with force and arms, feloniously break and enter into the dwelling house of James A. Smith, with intent to commit a larceny, and after so breaking and entering, did then and therein unlawfully, privately, wrongfully and fraudulently take and carry away therefrom, with the intent to steal the same, four lady's dresses, one string imitation pearl beads, and one lady's wrist watch, all of the value of $25.00, and of the personal goods of Mrs. James A. Smith, contrary to the law of said State, the peace, good order and dignity thereof.

Third Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further charge and accuse the said Sylvester Middlebrooks, of the of-

fense of burglary; for that the said accused, in the county and State aforesaid, on the 10th day of July, 1932, did then and there unlawfully and with force and arms feloniously break and enter into the dwelling of Clifford McKay, with intent to commit a larcency, and after so breaking and entering, did then and therein unlawfully, privately, wrongfully and fraudulently take and carry away therefrom with intent to steal the same one double barrel shot gun, one 45 calibre automatic pistol, one lady's size hunting case watch, and one Gibson Mandolyn with case, all of the value of $200.00, and of the personal goods of Clifford McKay, contrary to the laws of said State, the good order, peace and dignity thereof.

Fourth Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further charge and accuse the said Sylvester Middlebrooks, Jr., with having committed the offense of burglary; for that the said accused on the 15th day of July, 1932, in the County and State aforesaid, did then and there unlawfully and with force and arms, feloniously break and enter into the dwelling house of W. A. Bishop, with the intent to commit a larceny, and after so breaking and entering, did then and therein unlawfully, privately, wrongfully and fraudulently take and carry away therefrom, with intent to steal the same, one cameo pin, one gentleman's black cameo ring, one 32 calibre Smith & Wesson pistol, of the value of $25.00, and of the personal goods of W. A. Bishop, also four dozen men's hats of the value of

$75.00, and of the personal goods of Swann-Abram Hat Company, contrary to the laws of said State, the good order, peace and dignity thereof.

Fifth Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further charge and accuse the said Sylvester Middlebrooks, Jr., with the offense of burglary; for that the said accused on the 15th day of August, 1932, in the County and State aforesaid, did then and there unlawfully and with force and arms, feloniously break and enter into the dwelling house of J. A. Hunt, with the intent to commit a larceny, and after so breaking and entering did then and therein unlawfully, privately, wrongfully and fraudulently take and carry away therefrom, with intent to steal the same one 38 calibre pistol, and one small toy cash register, and one check protector machine, all of the value of $50.00, and of the personal goods of J. A. Hunt, contrary to the laws of said State, the good order, peace and dignity thereof.

Bibb Superior Court, November Term, 1934.

/s/ CHARLES H. GARRETT,
Solicitor General.

/s/ A. W. McCLURE,
Prosecutor.

BIBB

Superior Court
N W Term, 1934

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS, JR.,
Burglary

True Bill,

JOHN E. WILSON,
Foreman.

CHAS. H. GARRETT,
Solicitor General.

A. W. McCLURE,
Prosecutor.

Witnesses:

A. W. McCLURE,
Mulberry St.

CLIFFORD McKAY,
Letter Shop.

J. A. HUNT,
220 Macon St.
(Georgia Place)

JAS. A. SMITH,
Elberta, Ga.

W. A. BISHOP,
624 Ingleside Ave.

LANEY BROWN,
c/o Amos Wilder,
Hawkins Ave.

AMOS WILDER,
Hawkins Ave.

BROTHER SIMMONS,
Roy St.

CALVIN FLEMING,
Bartlett's Crossing.

OFF. STEVENS.

The Defendant waiver being formally arraigned, and pleads not guilty under each of the counts of the indictment. This Feb. 8th, 1935.

/s/ CHAS. H. GARRETT,
Sol. Gen.

Copy of the Bill of Indictment and List of Witnesses, sworn before the Grand Jury, waived before arraignment.

....,
Defendant's Attorney.

State of Georgia,
County of Bibb;

Clerk's Office, Bibb Superior Court.

I, Romas Ed Raley, Clerk Bibb Superior Court, do certify that the foregoing 4 pages hereto attached contain a true and correct copy of the Indictment of Sylvester Middlebrooks, Jr., just as same appears of file and record in this office.

In Witness Whereof, I have hereunto set my hand and affixed my seal, this 28th day of January, 1949.

[Seal] /s/ ROMAS ED RALEY,
Clerk, Bibb Superior Court.

[Stamped] State Board of Correction, Jan. 31, 1949.

State of Georgia, Bibb County

In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 1935, and Plea of Guilty.

Whereupon, The Defendant being before the Bar

of this Court and showing no reason why the sentence of the Court should not be pronounced,

It Is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of Said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for not less than One year, and for not more than One year, to be computed from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion of other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

It Is Further Ordered, That the Clerk of this Courtnotify the Prison Commission of the State of

Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court.

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and the Seal of said Court, this 28th day of January, 1949.

[Seal] /s/ ROMAS ED RALEY,
Clerk of Superior Court,
Bibb County, Ga.

State of Georgia, Bibb County
In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 1935, and Plea of Guilty as to Count 5 of said indictment,

Whereupon, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced,

It Is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of Said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for not less than One

year, and for not more than One year, to be computed after the expiration of the sentence in Count 4 of said indictment, from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

It Is Further Ordered, That the Clerk of this Court notify the Prison Commission of the State of Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court.

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and the Seal of said Court, this 28th day of January, 1949.

/s/ ROMAS ED RALEY,
Clerk Superior Court,
Bibb County, Ga.

Penitentiary Sentence

State of Georgia, Bibb County

In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 194.., and Plea of Guilty as to Count 4 of said indictment.

Whereupon, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced,
It is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of Said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to

whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for not less than One year, and for not more than One year, to be computed after the expiration of the sentence in Count 3 of said indictment, from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to cutody after a final disposition of all pending matters affecting the execution of this sentence.

It is Further Ordered, That the Clerk of this Court notify the Prison Commission of the State of Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court.

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and Seal of said Court, this 28th day of January, 1949.

/s/ ROMAS ED RALEY,
Clerk Superior Court,
Bibb County, Ga.

State of Georgia, Bibb County
In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SLYVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 1935, and Plea of Guilty as to Count 3 of said indictment,

Whereupon, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced,

It Is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for not less than One year, and for not more than One year, after the expiration of the sentence in Count 2 of said indictment, to be computed from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

It is Further Ordered, That the Clerk of this Court notify the Prison Commission of the State

of Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court:

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and the Seal of said Court, this 28th day of January, 1949.

/s/ ROMAS ED RALEY,
Clerk Superior Court,
Bibb County, Ga.

Penitentiary Sentence

State of Georgia, Bibb County
In the Superior Court of Said County

No. 2191

THE STATE,

vs.

SYLVESTER MIDDLEBROOKS.

INDICTMENT FOR BURGLARY

Tried at February Term, 1935, and Plea of Guilty as to Count 2 of said Indictment,

Whereupon, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced,

It Is Considered Ordered and Adjudged by the Court:

That you, Sylvester Middlebrooks, the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the Governor or Prison Commission of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may

be directed as aforesaid, for not less than One year, and for not more than One year, after the expiration of the sentence to Count 1 of said indictment, to be computed from this date, provided you remain in jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in jail pending the same, this sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

It is Further Ordered, That the Clerk of this Court notify the Prison Commission of the State of Georgia of your conviction and sentence, as required by law.

In Open Court, this 8th day of February, 1935.

W. A. McCLELLAN,
Judge S. C. M. C.

Georgia,
Bibb County,

Clerk's Office, Superior Court:

I Hereby Certify, That the foregoing is a true copy of the sentence passed in the above-stated case as the same appears from the record of file in said court.

Witness my Official Signature and the Seal of said Court, this 28th day of January, 1949.

/s/ ROMAS ED RALEY,
Clerk Superior Court,
Bibb County, Ga.

REQUISITION

by the
Governor of Georgia

for
Sylvester Middlebrooks

Charged With
Burglary (5 counts)

Extradition Warrant Issued
.....19....

[Seal]

By HERBERT SIMMONS, JR.

Receipt of Copy Acknowledged.

[Endorsed]: Filed Dec. 20, 1949. [31]

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 20th day of December, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable James M. Carter,
District Judge.

MINUTES OF DEC. 20, 1949

[Title of Cause.]

For hearing on return of Writ of Habeas Corpus, issued Nov. 22, 1949; John T. McTernan and Robert Simmons, Esqs., appearing as counsel for plaintiff; Vern Thomas, Deputy District Attorney, appearing as counsel for defendant; and both sides answering ready;

Attorney Thomas files Return to Writ and Points and Authorities.

On motion of Attorney Thomas it is ordered that Eugene Cook, Atty. Genl. of the State of Georgia, is admitted to appear herein as amicus curiae for the purpose of filing a brief only, said counsel not being personally present, and the brief of amicus curiae, received by mail by the Court, is now filed, pursuant to said order.

It is stipulated and ordered that the petition

herein be also deemed as a Traverse to the Return to Writ.

The petitioner is personally present and it ordered that the record so show. Attorney McTernan makes opening statement for the petitioner.

Attorney Thomas moves on behalf of respondent to discharge and dismiss the Writ on the ground that the petition and the opening statement of counsel for petitioner neither state facts sufficient to constitute a cause of action. Court orders said motion stand submitted and that hearing proceed. [32]

Attorney Thomas makes opening statement in behalf of respondent.

Sylvester Middlebrooks, Jr., petitioner herein, is called, sworn, and testifies in his own behalf.

Attorney Thomas, on behalf of respondent, objects to introduction of any evidence on the ground there is no cause of action, etc., and Court orders said motion submitted. Petitioner's Exhibits 1 and 2 are admitted in evidence.

At 11:05 a.m. court recesses. At 11:15 a.m. court reconvenes herein and all being present as before, including counsel for both sides, and the petitioner;

Sylvester Middlebrooks, Jr., petitioner herein, testifies further. Petitioner's Exhibits 3 to 7, inclusive, are admitted in evidence.

At noon court recesses to 1:30 p.m. At 1:30 p.m. court reconvenes herein and all being present as before, including counsel for both sides, and the petitioner; Sylvester Middlebrooks, Jr., testifies further and concludes his direct testimony.

Attorney Thomas moves to strike all testimony of Petitioner Middlebrooks and the said motion is taken under submission. There is no cross-examination.

Horace B. Conkle, witness for petitioner, is called, sworn, and testifies.

Attorney Thomas objects to any testimony being taken, renewing his previous similar motion, and ruling taken under submission, and Court orders that testimony proceed.

Elizabeth Murry, who is present, is ordered associated as co-counsel for petitioner, on motion of Attorney McTernan.

Attorney Thomas moves to strike the testimony of Witness Conkle and Court orders said motion taken under submission. There is no cross-examination. Petitioner's Exhibit 8 is marked for identification and offered in evidence, to which objection is made, and objection is sustained. At 2:30 p.m. court recesses.

At 2:40 p.m. court reconvenes herein and all being present as before, including counsel for both sides, and the petitioner;

Attorney McTernan reads an abstract of article into the record. Attorney Thomas moves to strike said matter from the record and Court orders said motion taken under submission. Both sides rest.

Court makes a statement and renders certain oral findings.

The case is re-opened and Respondent's Exhibit A is admitted in evidence, and it is stipulated and

ordered that Petitioner's Exhibit 9 is admitted in evidence, the said exhibit consisting of copies of the various petitions for Writs and Application for Stay presented to the various State courts, together with affidavits filed in support thereof, and that said exhibit may be delivered later to the clerk for so marking as Petitioner's Exhibit 9 in evidence. Both sides rest.

Attorney McTernan argues to the Court for petitioner. Attorney Thomas argues to the Court for respondent.

Court orders that the matter stand submitted upon filing of briefs 10x10x5, petitioner to open.

On motion of Attorney McTernan it is ordered that Lorrin Miller may appear as amicus curiae and file a brief, the Court stating, however, that it would prefer that the amicus curiae confine his briefing to collaboration with the petitioner in preparing his brief. [34]

In the United States District Court, Southern District of California, Central Division

No. 10586-C

In re:

APPLICATION OF SYLVESTER MIDDLEBROOKS, JR., FOR A WRIT OF HABEAS CORPUS

Appearances:

For Petitioner:

MARGOLIS & McTERNAN, and
HERBERT SIMMONS, JR.,
112 West 9th Street,
Los Angeles 15, California.

ELIZABETH MURRAY,
17 East Carillo Street,
Santa Barbara, California.

For Respondent:

DAVID S. LICKER,
District Attorney, Santa Barbara County,
Court House, Santa Barbara, California.

VERN B. THOMAS,
Asst. District Attorney, County of Santa Barbara,
Court House, Santa Barbara, California.

Amici Curiae:

LOREN MILLER,
129 West 3rd Street,
Los Angeles 13, California,
Attorney for National Association for the Advancement of Colored People.

EUGENE COOK,
Attorney General of the State of Georgia. [35]

OPINION

In this proceeding, Sylvester Middlebrooks, Jr., petitioned for a writ of habeas corpus, alleging that he was illegally held in custody by the Sheriff of Santa Barbara County, California, for extradition to the State of Georgia to there serve out the balance of a sentence imposed by a State court of Georgia; and that the custody of the California Sheriff was illegal, because:

(1) The conviction and sentence in the State of Georgia was void by reason of the failure of Middlebrooks to have counsel:

(2) There was actually no plea of guilty or trial before sentence;

(3) That the sentence and judgment of the State of Georgia violated the due process clause of the Fourteenth Amendment, in that it imposed upon Middlebrooks cruel and unusual punishment by the use of a chain gang;

(4) Other contentions not here pertinent.

The Sheriff of Santa Barbara county, John D. Ross, filed a return on the date of hearing, setting forth that he held custody of petitioner by virtue of a warrant issued by the Governor of the State of California, issued pursuant to a written demand for extradition by the Governor of the State of Georgia.[1]

By stipulation of the parties the petition for the writ was considered a traverse to the return. [36]

The petition for the writ further alleged that the petitioner had exhausted all his remedies in the State of California and in the Supreme Court of the United States by allegations that prior applications for writs of habeas corpus were made to the Superior Court, the District Court of Appeal, and the Supreme Court of the State of California, and that each of the applications was denied.

It alleged further that an application for a stay of execution was made to the Supreme Court of California, for the purpose of allowing counsel to petition the Supreme Court of the United States for a writ of certiorari, and that the same was denied.

Successive applications were made to Mr. Justice Douglas and Mr. Justice Black of the United States Supreme Court for a similar stay for the same

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[1]The return attaches copy of the warrant issued by the Governor of California and copies of demand by the Governor of Georgia, together with the supporting copy of indictment from Bibb County, Georgia, and the sentence and commitment.

purpose, and were successively denied. It was conceded by the parties that these steps have been taken, and petitioner's exhibit 9 contains copies of the successive petitions for writs and for stay referred to above.

Petitioner complains of action of the State of California in apprehending and holding petitioner in custody on the ground that such state action is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it deprives petitioner of due process of law on the grounds stated.

The Facts

Middlebrooks is a negro. Called as a witness, he testified he was born February 11, 1917, in Macon, Georgia. He left school at the age of 12 or 13 and never finished the third grade. In 1931, when 14 years of age, he was arrested for burglary, taken before a juvenile court and committed to [37] a reformatory, The Georgia Training School for Boys.

He spent about three months in the school, escaped, was re-arrested, sent again to the school, spent another five months and escaped again.

Middlebrooks was next arrested in June or July of 1934. He was then 17. He was held in jail, and in November, 1934, the grand jury of Bibb County, Georgia, returned an indictment charging him with five counts of burglary.[2]

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[2]The similarity, in fact identity, of the names of the victims on petitioner's exhibit No. 1, having

He was held in custody until February 8, 1935, at which time he was sentenced to one year on each of the five counts of the burglary indictment, to run consecutively. It is this sentence which is the basis of the demand for extradition and the issuance of the warrant on which petitioner is now held.

Middlebrooks testified to the facts surrounding his alleged trial and sentence as follows: That on the morning of February 8, 1935, the jailer came to his cell and said, in substance, "Get ready for trial in 15 minutes"; that he was taken into the court room where the Sheriff and Judge were present; that up to that time he had not been informed of what he was charged, nor had any copy of the indictment been delivered to him; that the following then transpired: The Judge said, "Don't you know you can't go around breaking the laws of Georgia?" The petitioner denied that he had broken any laws and said he wanted a lawyer and a jury. The Judge said, in substance, "I could give you 20 years, instead I am going to give you 5 years." That he was then taken to jail and assigned to a chain gang in Walton County, near Monroe, [38] Georgia.

Petitioner's exhibit No. 2, the indictment, contains on the back thereof, the following language:

"The Defendant waives being formally ar-

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reference to the juvenile offense, and the names of the victims in petitioner's exhibit No. 2, the indictment, show that the indictment was based upon the burglary acts committed when Middlebrooks was 14.

raigned, and pleads guilty under each of the counts of the indictment. This Feb. 8th, 1935.

Chas. H. Garrett—Sol. Gen.

"Copy of the Bill of Indictment and List of Witnesses, sworn before the Grand Jury, waived before arraignment.

. . . . . .

"Defendant's Attorney."

Nowhere else in the indictment form, nor in the sentence and commitment, is there any space for the name of an attorney for the defendant, nor does the name of an attorney appear anywhere therein.

Middlebrooks testified at length as to his experience on the chain gang in Walton County, Georgia. To summarize his extensive testimony briefly: 50 or 60 men were housed in one large room, 40 x 50 feet, with beds in tiers. No toilet facilities were available except large garbage cans which leaked badly and were emptied once a day. The prisoners worked from sun-up until sun-down, with a half hour off for lunch in winter and an hour off in summer time.

The food, and vermin and filthy substances contained therein, caused the prisoners to become sick with nausea and dysentery.

The prisoners were attended by guards armed with guns and sticks. The prisoners were often beaten and whipped. Double shackles were used, consisting of a band on each ankle and a chain 14 to 16 inches long in between. "Picts" were also

used, consisting of long points emanating horizontally from the band at the ankle. These were used if the prisoner [39] did not work sufficiently hard or if the guards thought he might attempt to run away.

"Stocks" were used. He described one in which he had been placed on six different occasions for approximately one hour each. The prisoner was seated on the narrow edge of a 2 x 4, his wrists and ankles placed through holes in the stock. His body thereby leaned forward at a 45 degree angle. A 2 x 4 was wired across his knees to keep them pressed down. When a prisoner was removed from the stocks, even after a one hour detention, he often was unable to walk and had to be dragged to the bull pen.

Sweat boxes were in use, consisting of small buildings 3 feet wide, 6 feet long, without light or heat. Often the prisoner was placed in the box without clothes, given two blankets, bread and water. The petitioner spent seven days in a sweat box.

Shackles were kept on at night, and the waist chains of the series of prisoners in one tier in the sleeping quarters would be threaded onto a long chain that ran the full length of the sleeping quarters, and the prisoners then kept in place by the locking of the long chain.

In addition, Middlebrooks related various individual acts of violence and brutaity, some of which

were directed towards him while other acts were directed against other prisoners.

After approximately two years he escaped and was brought back and served another year and thirteen days and escaped the second time. In April, 1942, he was inducted into the army and went AWOL in August, 1942. He was arrested by the Military and sentenced by Military court to fifteen years imprisonment, which was later commuted to a total of approximately three years and five months. [40]

At the time of his release from Military incarceration, he was in the State of California and was arrested by the Sheriff of Santa Barbara county, respondent herein, by virtue of a hold placed on him while in Military custody.

There was no cross-examination of Middlebrooks.

Horace Conkle, a resident of Santa Barbara county was called as a witness and described chain gangs in Colquett county, Georgia, in which he served following a conviction for burglary, in 1934. His testimony concerning housing, food, shackles, sweat box and whippings generally corroborated the petitioner's description. Conkle testified further that he was a visitor in Georgia in 1945 and 1946 and the chain gangs were still in operation, performing the same work with the same hours, using the same quarters. He saw shot guns and hickory sticks. He stated that two counties, Bibb and Muskogee, had adopted eight hour limits for work.

There was no cross-examination of Conkle.

No evidence was offered by respondent[3] except the certified copy of the Sheriff's return to the writ which had been filed in the Superior court of Santa Barbara county.

The respondent Sheriff asked dismissal of the petition for the writ on the grounds that it did not state sufficient facts to constitute a cause of action upon which relief could be granted and on lack of jurisdiction in the court. [41]

Similar objection was made to the opening statement of petitioner's counsel.

Objection was also made to the testimony of the petitioner and the witness Conkle, and motions were made to strike the testimony after it was given on the same grounds.

There was conflict on the issue of the alleged trial, between the record of the State court and the uncontradicted testimony of the petitioner. The

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[3]This is significant, for the reason that petitioner made the same contentions in his petitions for writ, in the State courts that he made in the District Court, and was afforded a hearing by the Superior Court of Santa Barbara county. Respondent was therefore sufficiently informed prior to the trial in this court, of the nature of petitioner's contentions, to have presented contradictory evidence by way of affidavit or otherwise. In addition. the attorney general of the State of Georgia filed a brief on the law as amicus curiae. The court can assume he was therefore informed of the nature of the allegations in petitioner's petition for writ of habeas corpus, including the allegations of cruel and unusual punishment, of lack of counsel and of the alleged sentence without plea or trial.

court is not bound by the bare record. Upon application for a writ the court must inquire at petitioner's request into all facts going to:

> "* * * the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him * * * it is open to the courts of the United States upon an application for a writ of habeas corpus to look beyond forms and inquire into the very substance of the matter * * *" Frank v. Magmum, 237 U.S. 309, 330-1; 59 L. Ed. 969, 981 (1915). See also Johnson v. Zerbst, 304 U.S. 458, 466-467, 82 L. Ed. 1461, 1467-1468 (1938); Waley v. Johnston, 316 U.S. 101, 104-5; 86 L. Ed. 1302, 1304; Mooney v. Holohan, 294 U.S. 103, 112, 115; 79 L. Ed. 791; 794, 795; Moore v. Dempsey, 261 U.S. 86, 91; 67 L. Ed. 543, 545; Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 171-172.

The court finds that:

(1) Petitioner was not yet 18 at the time of his sentence on the indictment; that he had not finished the third [42] grade in grammar school and was generally ignorant and uneducated; that he was not given at any time, a copy of the charges against him; that he asked for an attorney but that one

was not assigned and that no attorney consulted with him or appeared for him; that the only unofficial person he saw while in jail, during the period of his arrest in June of 1934 until his sentence on February 8, 1935, was his mother.

(2) That the defendant was not afforded a trial or an arraignment, but instead was brought before the Judge and sentenced without having entered a plea of guilty, or without a trial having occurred.[4]

(3) The court found that the assignment to, and the work on the chain gang constituted cruel and unusual punishment and that this type of imprisonment was part of the penal system of the State of Georgia and incident to the sentence imposed upon the petitioner by the Georgia court.

The Questions Presented

(1) Was the failure to assign counsel, under the facts and circumstances and in light of petitioner's age, education and experience, a deprivation of due process of law?

(2) Was the sentence without plea or trial, namely the kangaroo court, a deprivation of due process of law?

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[4]The court makes this finding for the following reasons: The court observed petitioner in court and was of the opinion that the petitioner spoke the truth; and for the reasons set forth in note [3] supra.

(3) Is cruel and unusual punishment, which is prohibited by the Eighth Amendment, included within the protection of the Fourteenth Amendment against State action?

(4) Assuming questions 1, 2 and 3 are answered in [43] the affirmative, does the action of the State of California, through the Sheriff of Santa Barbara county in arresting and detaining petitioner, constitute violation of the due process clause of the Fourteenth Amendment?

(5) Should relief be denied because of the Uniform Extradition Act of the State of California, § 1548.2 of the Penal Code of the State of California, and the Federal provisions, Art. IV, § 2, Clause 2 of the Constitution of the United States and the acts of Congress, regulating interstate extraditions, Title 18 U.S.C., § 3182.

(6) Has petitioner exhausted his remedies in the California courts so as to permit him to sue for relief in a Federal court?

(7) Must petitioner have also exhausted his remedies in the State of Georgia?

In addition to the novelty of the questions presented, the case has additional significance.

A vocal and disloyal political group in the country continually seizes upon alleged violation of rights of negroes, not for the purpose of honestly assisting the negro, but for the purpose of allowing this group to proclaim itself as the protector of

negro rights. Its object of course is to enlist the negro in its ranks and its disloyal cause.

Courts, and particularly Federal courts, should be ever ready to listen with a sympathetic and tolerant ear to persons who claim their constitutional rights have been abridged.

The untreated wound becomes an ulcer and the ignored grievance a cause. [44]

I.

The Failure to Afford Petitioner Counsel, Under the Particular Facts Involved, Constituted Denial of Due Process by the State of Georgia.

The Sixth Amendment to the Constitution of the United States, referring to the "assistance of counsel"[5] is a limitation on the power of the Federal government, and not the States. See Adamson v. California, 332 U.S. 46 (1947).

In Betts v. Brady, 316 U.S. 455 (1942), Mr. Justice Roberts, speaking for the Supreme court, said at p. 473:

"* * * the Fourteenth Amendment prohibits conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that

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[5]Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right to * * * have the Assistance of Counsel for his defense."

the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

The decision in each particular case will rest on the facts of that case. Wade v. Mayro, 334 U.S. 672 (1948) and Uveges v. Pennsylvania, 335 U.S. 437 (1948). Thus, although Mr. Justice Reed dissented in the Wade case,[6] he wrote the [45] opinion for the court in the Uveges case, and at page 440 he said:

"* * * Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See Bute v. Illinois, 333 U.S. 640, dissent, 677-79. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See Betts v. Brady, 316 U.S. 455, 462. Where the gravity of the crime and other factors—such as the age and education of the

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[6]Although the dissent hinges on Justice Reed's conclusion that State remedies were available (p. 697), note the references to petitioner's right and opportunity to secure counsel to review his alleged erroneous conviction (p. 697).

defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group holds that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without [46] counsel.

"The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials. The application of the rule varies as indicated in the preceding paragraph.

"Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trail. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an adviser to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to

counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea * * *"

See Gibbs v. Burke, 337 U.S. 773 (1949) where the [47] failure of a State court to provide counsel for an adult (among other irregularities), was held a deprivation of due process.

The court said, p. 781:

"* * * This case is of the type referred to in Betts v. Brady, supra, at 473, as lacking fundamental fairness because neither counsel nor adequate judicial guidance or protection was furnished at the trial.

"A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than is one who pleads guilty. The record in this case evidences petitioner's helplessness, without counsel and without more assistance from the judge, in defending himself against this charge of larceny. We take no note of the tone of the comments at the time of the sentence. The trial was over. The questionable issues allowed to pass unnoticed as to procedure, evidence, privilege, and instructions detailed in the first part of this opinion demonstrate to us that petitioner did not have a trial that measures up to the test of fairness prescribed by the Fourteenth Amendment."

In the case at bar, Middlebrooks was a negro boy, just under 18 years of age at the date of sentence.

He had not finished the third grade in school, and was held under arrest for a serious crime, burglary. He was not advised of the charge, nor given any copy of the indictment. He was advised [48] of the consequences, the penalties of the crime, but when he asked for a lawyer, his request was refused and he was sentenced.

Under these facts, it was a denial of due process under the Fourteenth Amendment for the State of Georgia to have failed to afford him counsel.

II.

The Sentence Imposed on Petitioner, Without the Entry of a Plea of Guilty, or Without a Trial First Had, Constituted a Violation of the Due Process Clause of the Fourteenth Amendment.

Having found petitioner's allegations true, there was obviously a denial of due process under the Fourteenth Amendment, where the state court sentenced in the absence of a plea of guilty or a trial and finding of guilt.

Simons v. United States, 119 F. 2d 539 (9th Cir. 1941), cert. denied, 314 U.S. 616 (1941), states at p. 544:

"* * * Due process of law in a criminal proceeding has been defined as consisting of 'a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial according to established procedure, and discharge unless found

guilty.' See 16 C.J.S., Constitutional Law, § 579, p. 1171, and cases cited * * *"

Hague v. C.I.O., 101 F. 2d 774 (3rd Cir. 1939), modified on other grounds, 307 U.S. 496 (1939), states at p. 781, 782:

"* * * An individual has a right to trial by properly constituted judicial authority upon a defined standard of criminal responsibility [49] set forth by statute or ordinance. He must have the opportunity to be heard and to call witnesses in his own defense. This is the very essence of due process of law as prescribed by the Fourteenth Amendment. Powell v. Alabama, 287 U.S. 45, 68, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527; Snyder v. Massachusetts, 291 U.S. 97, 122, 54 S. Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575; United States v. Ballard, D.C., 12 F. Supp. 321, 325. * * *"

In Gibbs v. Burke, 337 U.S. 773 (1949) when defendant had a trial but no counsel, the court held it lacked "fundamental fairness." (p. 781.)

III.

The Punishment Inflicted by the State of Georgia Through Its Chain Gang Is a Deprivation of Due Process of Law, Contrary to the Fourteenth Amendment.

The Eighth Amendment to the Constitution prohibits cruel and unusual punishment. Like the Sixth Amendment, it is a limitation on the power

of the Federal government, and is not operative against State action.

There has been considerable discussion and much contention that the first eight Amendments have been included, in substance, by reference in the Fourteenth. But this question was squarely presented to the Supreme Court in a case involving the Fifth Amendment. [50]

In a landmark decision, the Court by a 5 to 4 decision, held to the contrary. Adamson v. California, 332 U.S. 46 (1947).[7]

However, in the language of Mr. Justice Frankfurter, concurring in Francis v. Resweber, 329 U.S. 459 (1947) at 468:

"In an impressive body of decisions [the Supreme Court] has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the par-

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[7]For an extensive discussion, see 2 Stanford Law Review 5, Does the Fourteenth Amendment Incorporate the bill of Rights? (1) The Original Understanding, by Charles Fairman (p. 5); (2) The Judicial Interpretation, by Stanley Morrison (p. 140). But see Wolf v. Colorado, 338 U.S. 25 (1949), wherein Mr. Justice Rutledge, dissenting sees an admission (p. 47) in the language of the majority (p. 27, 28) that the substance of the Fourth Amendment is "* * * implicit in the concept of ordered liberty," and thus, through the Fourteenth Amendment valid against the states.

ticularities of the first eight amendments, nor are they confined to them."

This language by Mr. Justice Frankfurter, concurring with the majority opinion in the above case, coupled with the dissent by Jutices Burton, Douglas, Murphy and Rutledge, indicates that Francis v. Resweber (supra) substantially holds that cruel and unusual punishment inflicted by a State is a deprivation of due process of law, contrary to the Fourteenth Amendment. It is true that the majority assumed, without so deciding, that a violation of the provisions of the Eighth [51] Amendment would be violative of the due process clause of the Fourteenth Amendment. This, of course, is not authority. Mr. Justice Reed, who wrote the majority opinion, however, observed later therein (p. 463):

"Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause, execution by a State in a cruel manner."

(Citing In re Kemmler, 136 U. S. 436 (1890 at 446.)

In Johnson v. Dye, 175 F. 2d 250 (3d Cir. 1949), rev'd. per curiam, 18 U.S.L. Week 3148 (1949), there was a square holding that the infliction of cruel and unusual punishment by a State was denial of due process of law contrary to the Four-

teenth Amendment. While this decision was reversed by the Supreme Court of the United States (18 LW 3148), the citation of Ex parte Hawks, 321 U. S. 114 (1944) in the reversal, indicates that the case was reversed because of the circuit's holding that State remedies need not be exhausted. The Supreme Court, contrary to its normal practice in such cases, took unusual care to indicate the grounds of the reversal by a citation of the Hawks case.[8]

We expressly rely upon the language of Chief Judge Biggs of the 3rd Circuit, in Johnson v. Dye, 175 F. 2d 250, (3rd Cir. 1949), at 255: [52]

"* * * But we entertain no doubt that the Fourteenth Amendment prohibits the infliction of cruel and unusual punishment by a state. State of La. ex rel. Francis v. Resweber, supra. Compare Weems v. United States, 217 U. S. 349, 30 S. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; In re Kemmler, 136 U. S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519. We are of the opinion that the right to be free from cruel and unusual punishment at the hands of a State is as 'basic' and 'fundamental' a one as the right of freedom of speech or freedom of religion. And it should be pointed out that actions of the employees of the prison system of Georgia must be deemed to be those of the State of Georgia. The fact that a state officer acts illegally cannot

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[8]This conclusion is also reached in the interpretation placed upon Johnson v. Dye, by 2 Stanford Law Review 174, 184 (Case of the Fugitive from the Chain Gang).

relieve a state of responsibility for his acts. Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330. * * *''

It follows that the action of the State of Georgia, in making use of the chain gang in carrying out the sentence imposed upon the petitioner, is denial of due process, violative of the Fourteenth Amendment. [53]

IV.

The Action of the State of California, Through the Sheriff of Santa Barbara County in Arresting the Petitioner and Holding Him in Custody for Extradition to the State of Georgia, in Order That He May Be Again ''Confined in the Georgia Penitentiary to Complete the Terms of His Sentence'' is Action Violative of the Due Process Clause of the Fourteenth Amendment.

Petitioner bases his case upon the contention that California action in arresting and holding the petitioner in custody, constitutes a violation of the due process clause of the Fourteenth Amendment.

California, through the respondent, the Sheriff of one of its political subdivisions, has arrested the petitioner upon a warrant issued by the Governor of California, and now holds him in custody. The Fourteenth Amendment protects against all State action by any of its officers, executive or judicial. (See Civil Rights cases, 109 U. S. 2, 11; 27 L. Ed. 835, 839 (1883). How can it be said that the action complained of is not State action by California?

California is a separate sovereignity. It acts,

through its Governor in issuing the warrant of arrest, on its own authority. Governors of States have refused to grant extradition and when a State refuses to grant the request of the demanding State no compulsion can be brought upon the State to honor the request.

Kentucky v. Dennison, 65 U. S. 66, 16 L. Ed. 717 (1860). Thus we have State action, based on independent decision and not mere mechanical causation.

California has taken this action pursuant to the provisions of Art. IV, Sec. 2, Clause 2 of the Constitution of the United States, and the act of Congress regulating interstate extradition, Title 18, U.S.C., §3182. California has further acted pursuant to the Uniform Extradition Act, a [54] statute of the State of California.

Section 1548.2 of the Penal Code of the State of California, one of the provisions of that act, provides for the form and prerequisite allegations for the demand for extradition.

Section 1549.2 of the Penal Code, another provision, provides that the Governor shall sign a warrant of arrest under the State Seal, directed to any peace officer in the State of California. Obviously, this is State action by California, regardless of the reasons therefor, or the validity thereof.

In fact, the respondent relies on these constitutional and statutory provisions to support his position.

The action of the State of California may be

ostensibly valid action, pursuant to the Federal Constitutional provision and pursuant to California statutes and at the same time be State action depriving petitioner of due process of law under the Fourteenth Amendment. This is true on two grounds:——

(1) The arrest and custody were ostensibly valid on the ground the petitioner was a fugitive from justice, who had escaped after a valid conviction and sentence, and that extradition had been demanded and petitioner arrested and held pursuant to a warrant from the Governor of California; but in view of the findings of this court, the Georgia conviction and sentence was void and of no legal effect because of the deprivation of counsel, and the mock trial to which petitioner was subjected. It follows, since the conviction is void, that California had no jurisdiction to arrest and has no jurisdiction to hold.

(2) The action of the State of California was requested by the State of Georgia for the purpose, as shown by the return of the respondent herein, "solely that he (the petitioner) [55] may be brought back and again confined in the Georgia penitentiary to complete the term of his sentence." It now appears that the portion of the sentence heretofore served, was on a chain gang; and this court is justified in concluding[9] that upon his return to Georgia,

[9]Note the words, "be brought back and again confined" in the Georgia demand.

petitioner would again be placed upon a chain gang.

California therefore, through the respondent, Sheriff, becomes an active participant in subjecting the petitioner to what this court has found to constitute cruel and unusual punishment, in violation of the Fourteenth Amendment. California becomes therefore an active participant in attempting to again subject this petitioner to such punishment. This is State action by California, in violation of the due process clause of the Fourteenth Amendment.

V.

Neither the Uniform Extradition Act of the State of California, Nor Article IV, §2, Clause 2 of the Constitution of the United States Nor the Acts of Congress, Regulating Interstate Extraditions, Prevail Over the Fourteenth Amendment.

The proposed rendition of the prisoner by California is pursuant to the compact to effect rendition of persons "charged in any State with Treason, Felony or other crime," contained in Art. IV, §2, Clause 2 of the U. S. Constitution. But Art. IV does not require rendition which violates the Fourteenth Amendment of the same Constitution. This disposes of the respondent's contention that to grant the release of petitioner under this writ, the court must hold unconstitutional the Uniform Extradition Act of the State of California. [56]

Statutes constitutional on their face may not be

used for unconstitutional purposes or with unconstitutional results.

See Yick Wo v. Hopkins, 118 U. S. 356; 373-374, 30 L. Ed. 220 (1886).

As we have stated herein action by a State in arresting and holding a prisoner for extradition, may be ostensibly lawful and then by the revelation and judicial finding of certain facts thereafter, may be determined to be unlawful custody, violative of the due process clause of the Fourteenth Amendment.

VI.

Petitioner Has Exhausted His Remedies in the State Court of California.

Petitioner has sought relief in the Superior, District Court of Appeal and the Supreme Court of the State of California.

In addition, he petitioned the Supreme Court of California for a stay in order that he might seek certiorari in the United States Supreme Court, but the stay was denied.

He has thus gone farther than the petitioner in Morgan v. Horrall, 175 F. 2d, 404 (1949).

There is was noted that Morgan (p. 407):

"* * * made no attempt to secure from a Justice of the California Supreme Court or from a Justice of the Supreme Court of the United States a stay of execution of the judgment of the State Courts—this for the purpose of securing allowance of a reasonable time in which to obtain a writ of cer-

tiorari from the Supreme Court of the United States. * * *'' [57]

Middlebrooks also petitioned two Justices of the United States Supreme Court for a stay for the same purpose.

The only step he has not taken was to have petitioned the Supreme Court of the United States for certiorari. The law does not require the making of a futile petition for certiorari. It requires only the exhaustion of meaningful remedies. Wade v. Mayo, 334 U. S. 672, 682 (1948). Without the stay the petitioner would have been removed from California before the petition could have been presented and the case would have been moot.

The petitioner took the required and logical steps and has exhausted his remedies in the California courts.

VII.

The Petitioner Need Not Have Exhausted His Remedies in the State of Georgia.

The three grounds which have been relied upon by petitioner for relief herein are, (1) the alleged failure to assign counsel; (2) the alleged mock trial, with absence of either a plea of guilty or a trial of the facts; (3) the alleged imposition of cruel and unusual punishment.

It is arguable that if petitioner returned to Georgia, he might be able to raise in the courts of Georgia, the first two points, and that a remedy would exist in that State, wherein he could have the

conviction and sentence set aside, have counsel appointed and have the benefit of either a plea of guilty or a trial. As a practical matter, it is extremely remote that any of this relief would be granted him. Respondent, in substance, urges that he be returned to Georgia and there seek this relief.

This is unrealistic reasoning. [58]

28 U.S.C., §2254, is headed, "State Custody. Remedies in State Court." It reads as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The section obviously contemplates a situation where the writ in the Federal court seeks the release of a prisoner held in a particular State's custody by virtue of a State court judgment in that State. The petitioner herein is held in custody in California by reason of the warrant for arrest issued by the Governor of the State of California

to return the petitioner to Georgia to complete the service of the Georgia sentence. The section does not by its language, answer our inquiry.[10] [59]

Moreover, no case has been called to our attention, nor can we find one where Title 28 U.S.C., §2254, or the principle therein codified has been relied upon in a habeas corpus proceeding to require the exhaustion of the remedies in the demanding State, as well as in the asylum State.

In Morgan v. Horrall, 175 F. 2d 404 (9th Cir. 1949), extradition was involved, wherein Colorado was demanding the prisoner. The Circuit affirmed the judgment on the ground that the petitioner had made no clear and convincing showing of violation of "rights under the Federal Constitution" (p. 407). As an additional ground the Circuit Court found that all available remedies in California had not been exhausted. Neither the Circuit or the District Court (78 Fed. Supp. 756) discussed or considered the question of exhausting State remedies in Colorado.

To sustain respondent's argument would require that a prisoner exhaust his remedies in every state in which a remedy was available, and in an extradi-

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[10]The Reviser's Notes to 28 U.S.C., §2254, states: "This new section is declaratory of existing law as affirmed by the Supreme Court. (See Ex Parte Hawk, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. Ed. 572."

See Young v. Ragen, 69 S. Ct. 1073, 1074, Note 1 to the same effect.

tion matter this would involve at least two states and possibly more.

But the argument is fallacious upon another ground. To sustain respondent's argument would require this District Court to close its eyes to the violation of Constitutional rights and basic liberties which have occurred, and to permit the return of the petitioner to the State of Georgia. If Constitutional rights and basic liberties are to be protected, they must be protected in the courts where the questions arise and when the questions arise, and the shunting of a case from one court to another should as far as possible, be avoided.

As to petitioner's ground (3) the imposition of cruel and unusual punishment, the answer is clearer. The use of the chain gang is a part of Georgia's penal system. A requirement that the petitioner exhaust in Georgia his remedy on [60] this particular point would be obviously an idle act, since the court can assume that the Georgia chain gangs are operated under and pursuant to Georgia law.[11]

The court is not unmindful of the large body of law holding in substance that lower Federal courts

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[11]The supporting documents in the demand for extradition contain the application to the Governor of Georgia, executed by the Georgia State Board of Corrections. It reads in part: "* * * Sylvester Middlebrooks * * * While confined in said penitentiary escaped from Walton County Public Works Camp, Monroe, Georgia, a branch of the Georgia Penitentiary * * *"

should not consider an application for writ of habeas corpus, where petitioner is detained under State process, except in rare cases where exceptional circumstances of peculiar urgency are shown to exist. In re Anderson, 117 F. 2d 939 (9th Cir. 1941); Hawk v. Olson, 130 F. 2d 910 (8th Cir. 1942) (see cases collected at p. 911).

But in Ex Parte Hawk, 321 U. S. 114 (1944) at 117, in a per curiam decision, the court said:——

"* * * The statement that the writ is available in the federal courts only 'in rare cases' presenting 'exceptional circumstances of peculiar urgency,' often quoted from the opinion of this Court in United States ex rel. Kennedy v. Tyler, (269 U. S. 13, 17—19253 was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right.

"Where the state courts have considered and adjudicated the merits of his contentions, [61] and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. * * *"

A further result has grown up in the cases which is apparent to anyone making a study thereof; the rule of the exhaustion of remedies in the State has been supplemented by the further rule that once the remedies have been exhausted and the highest court

of the State has passed upon the problem, then Federal courts are reluctant to intervene because of comity and out of respect for State courts. Thus, there has been created an endless circle, which if followed to its logical conclusion would deny to a Federal District court the right to give relief for violations of basic constitutional rights.

The Supreme Court states in Ex parte Hawk, (supra) "a federal court will not ordinarily re-examine upon writ of habeas corpus, the questions thus adjudicated" [emphasis supplied].

The general rule rests upon the balance between the State and Federal powers and jurisdictions, and the niceties of the comities existing between these separate sovereignties. The observance of these niceties and the concern concerning comity must give way on the assertion and the finding of the violation of basic constitutional rights.

Such a violation constitutes an exceptional case. It is therefore important that the exception be recognized and that where basic constitutional rights and liberties have been violated, that Federal court should not refuse to grant relief. [62]

28 U.S.C., §2241, reads in part as follows:

"Power to grant writ * * * (c) The writ of habeas corpus shall not extend to a prisoner unless —(3) He is in custody in violation of the Constitution or laws or treaties of the United States."

It is patent that this petitioner is in custody in violation of the Constitution of the United States.

We hold therefore, that our duty is to entertain and grant his petition and not to require him to first exhaust remedies in the State of Georgia, as well as in the State of California.

JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed Feb. 3, 1950. [63]

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday, the 3rd day of February, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTES OF FEB. 3, 1950

On the matters heretofore submitted, the decision of the Court is as follows:

The motions of the respondent to dismiss and to strike evidence are denied. The objections of re-

spondent to the admission of evidence are overruled.

Decision for the petitioner, findings and judgment to be drawn and signed; counsel for petitioner to submit same within ten days.

The petitioner will be enlarged upon bond for appearance to answer the judgment of the Apellate Court, if appeal is taken. (Rule 29(c) Court of Appeals for the Ninth Circuit.)

Bond is fixed in the sum of $2,000.

If appeal is taken, certificate of probable cause under 28 U.S.C. 2253, will be issued.

Written opinion filed. [64]

[Title of District Court and Cause.]

ORDER FOR RELEASE OF PETITIONER

This Court, having determined to grant the petitioner's application for a writ of habeas corpus in accordance with its opinion filed on February 3, 1950, and having directed the submission of findings and judgment, and being fully advised in the premises,

Does hereby order as follows:

1. Petitioner shall be forthwith enlarged prior to the signing of findings and judgment, upon the posting of security in the sum of Two Thousand Dollars ($2,000.00) conditioned upon, (a) his return upon any order of this Court, (b) in the event

of an appeal from the judgment of this Court issuing the writ of habeas corpus, his return upon any order of the appellate court having jurisdiction of such appeal, (c) his remaining within the jurisdiction of this Court pending further order of this Court or order of the appellate court having jurisdiction of the aforesaid appeal, (d) in the event of the petitioner's default or contumacy with respect to the conditions herein set forth, said security shall be subject in all respects to the provisions of Rule 8 of this Court. [65]

2. At such time as the findings and judgment are signed herein and the writ of habeas corpus shall issue, the security posted pursuant to paragraph 1 of this Order shall be deemed posted for the purpose of, and shall be, the security required by the said writ.

3. In the event that no appeal shall be taken from the judgment herein within the time prescribed by law, then upon the expiration of said time petitioner shall be unconditionally released and the security posted pursuant to this Order shall be exonerated.

Dated at Los Angeles, California, this 7th day of February, 1950.

/s/ JAMES M. CARTER,
District Judge.

Judgment entered Feb. 8, 1950.

[Enclosed]: Filed Feb. 7, 1950.

At a stated term, to wit: The February Term. A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 5th day of April in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable: James M. Carter,
District Judge.

[Title of Cause]

MINUTES OF APRIL 5, 1950

On request of counsel for respondent, and good cause appearing, it is ordered that respondent have to, and including April 20, 1950, within which to file any objections he may have to the form of the findings and judgment proposed by petitioner.

At a stated term, to wit: The February Term. A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 27th day of April, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable: James M. Carter, District Judge.

[Title of Cause.]

MINUTES OF APRIL 27, 1950

The Court having duly considered the proposed findings submitted by counsel for petitioner and the objections thereto filed by respondent, it is ordered that the objections are sustained in part and overruled in part, and it is ordered that counsel for petitioner re-draft the findings to conform to said rulings, within five days, the particulars of said changes having been stated orally by the Court to counsel for petitioner. [67]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard on the petition and the respondent's return, the parties having stipulated that the petition might be deemed to be the traverse to the return. Evidence was taken and argument, both oral and in the form of extensive briefs, was heard. Being fully advised in the premises the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Petitioner, Sylvester Middlebrooks, Jr. (hereafter called petitioner), is a Negro and a citizen of the United States, and formerly a resident of the State of Georgia.

2. Petitioner has been arrested and is being held in custody by respondent Sheriff of Santa Barbara County (hereafter called respondent) under and pursuant to a warrant of arrest issued by the Governor of California upon written requisition of the Governor of the State of Georgia, certified as authentic. This requisition was accompanied with a copy of an indictment charging petitioner with [88] the commission of five counts of burglary, a copy of the judgments of conviction and sentence of petitioner on each of five counts of burglary, each of which accompanying documents was certified as au-

thentic. Petitioner was apprehended and held for the purpose of delivering him to agents of the State of Georgia, by them to be conveyed to that State solely in order that he might be confined in a Georgia penitentiary to complete the terms of said sentence contained in said judgment made and entered in the Superior Court of Bibb County, State of Georgia, more particularly described below.

3. Petitioner was arrested in Bibb County, Georgia in June or July, 1934. At that time petitioner was seventeen years of age and had not finished the third grade of school. He was unfamiliar with both the substantive and procedural aspects of criminal law. Petitioner was held in jail continuously after his arrest, and in November, 1934, the grand jury of Bibb County, Georgia, returned an indictment charging petitioner with five counts of burglary, a felony punishable at that time in Georgia by a sentence up to twenty years in the penitentiary. This indictment was based upon acts allegedly committed by petitioner when he was fourteen years of age. Petitioner was never given or shown a copy of this indictment. Petitioner was brought to trial upon this indictment on February 8, 1935; he received fifteen minutes' notice of the trial by his jailor. At the time of trial petitioner asked for counsel. His request was ignored. Petitioner was not represented by, nor did he have the advice of counsel at or before the proceedings upon the indictment referrd to above before the Superior Court of Bibb County, Georgia, on February 8, 1935; and no counsel appeared on

behalf of petitioner at said proceedings. The said Superior Court refused or failed to afford counsel to petitioner upon his request.

4. At the proceedings upon the indictment before said Superior Court on February 8, 1935, petitioner was not arraigned. He did not enter a plea of guilty and there was no trial of issues [89] of fact before a judge or jury. Sentence was passed by the judge of the Superior Court fo Bibb County, Georgia, after petitioner had said that he had broken no laws and that he wanted a lawyer and a jury trial. Petitioner was sentenced to imprisonment in the penitentiary of Georgia for a period of one year on each of the five counts in the indictment, the sentences to run consecutively.

5. After his sentence petitioner was sent to the Walton County Public Works Camp of the State of Georgia, a branch of the penitentiary of that State. There petitioner was assigned to a chain gang and required to engage in painful labor under brutal and inhuman conditions. At all times while petitioner was confined to said public works camp he was required to wear an iron shackle on each ankle, connected by a heavy iron chain approximately sixteen inches in length. Picts, consisting of long metal points, were affixed horizontally from petitioner's ankle shackles. Petitioner was housed with fifty or sixty other prisoners in one large room approximately forty feet by fifty feet in size, with beds in tiers. No toilet facilities were available except a

large metal can which had no cover and which leaked badly, causing human excrement to be dispersed over large portions of the aforesaid room. This can was emptied once each day. Petitioner was required to work at hard and painful labor from sun-up until sundown each day, with one-half hour off for lunch in winter and one hour off in summer. Petitioner was attended by guards armed with guns and hickory clubs. Petitioner was often beaten and whipped. Petitioner was frequently confined in a stock. Petitioner was seated in said stock on the narrow edge of a two-by-four board with his wrists and ankles placed through holes in a board in front of him, causing his body to lean forward at a forty-five degree angle. Another two-by-four board was wired across his knees to force his legs to remain straight. When petitioner was removed from the stock he was unable to walk and had to be dragged to the living quarters above described. In said public works camp [90] petitioner was also frequently confined in a sweat box. This consisted of a small space three feet wide and six feet long, without light, heat or ventilation. When confined in the sweat box petitioner was deprived of clothing, given two blankets for covering and bread and water for food. Petitioner spent up to seven consecutive days in such a sweat box.

6. The conditions obtaining at the Walton CountyPublic Works Camp of the State of Georgia, set forth in paragraph 5 above, were of general application to persons confined upon conviction of fel-

ony and consisted of systematic, deliberate and methodical employment of aggravated brutality. The methods and practices set forth in paragraph 5 above were at all times herein material, and are, open, notorious and of long standing. This form of imprisonment and punishment was an integral part of the penal system of the State of Georgia at the time that petitioner was sentenced and at all times that he was confined in the State of Georgia; it is such at the present time. Confinement in a chain gang subject to the conditions set forth above was an inseparable part of the sentence imposed upon petitioner by the Superior Court of Bibb County, State of Georgia, on February 8, 1935.

7. While confined in said penitentiary, petitioner escaped from the Walton County Public Works Camp on or about July 13, 1939, and fled the State of Georgia.

8. Should petitioner be returned to the State of Georgia upon requisition of the Governor of that State referred to above, he will again be subjected to the penal methods and practices set forth in paragraph 5 of these Findings.

9. Upon his arrest in California petitioner filed a petition for a writ of habeas corpus in the Superior Court of the State of California, in and for the County of Santa Barbara. After hearing, petitioner's application for a writ was denied. Thereafter petitioner filed an application for a writ of habeas

corpus with the [91] District Court of Appeals of the State of California, and this petition was denied without hearing. Thereafter petitioner made application to the Supreme Court of the State of California for a writ of habeas corpus and this application was denied without hearing. In each application petitioner set forth substantially the same facts as set forth in the petition to this court and as found herein. Following denial of his application for a writ of habeas corpus by the Supreme Court of California, petitioner applied to that Court for a stay of rendition pending application to the United States Supreme Court for a writ of certiorari. This application for a stay was denied. Thereafter petitioner made successive applications for a similar stay to two Justices of the United States Supreme Court and these applications were denied. Thereafter petitioner filed the petition herein. It would have been futile for petitioner to have applied to the United States Supreme Court for a writ of certiorari because in the absence of a stay of rendition petitioner would have been transported to Georgia and his petition to the United States Supreme Court would have become moot.

10. At the hearing on the writ no showing was made that there is now, or at any time herein material was, available to petitioner in California any remedy against the action of the State of California, set out in paragraph 2 above, other than a petition for a writ of habeas corpus.

11. The return of respondent to the writ raised the issue in paragraph IV of said return that the petition for a writ did not state facts sufficient to constitute a cause of action against the respondent. Oral motions on this ground and on lack of jurisdistion of the court were made by respondent at the inception of the case, and the same motions were made after the close of the opening statement of petitioner's counsel. The court did not rule on said motions, but took the same under submission. Objections were also made on behalf of respondent during the trial to testimony and other [92] evidence proffered on behalf of petitioner, on similar grounds, and on the further ground that the testimony and other evidence proferred was incompetent, irrelevant and immaterial, and also on such additional grounds as indicated by the reporter's transcript. Such objections were not ruled upon but taken under submission as were also motions made to strike the testimony and other evidence after it was given.

12. The findings of fact contained in the opinion of the court filed February 3, 1950, are by this reference incorporated in these Findings of Fact as fully as if set forth in haec verba.

Conclusions of Law

1. Petitioner has exhausted all remedies available to him in the courts of the State of California. It was unnecessary for him to file a petition for a writ of certiorari in the United States Supreme Court for the reason that before it could have been

acted upon he would have been transported to the State of Georgia and his petition would have become moot.

2. The action of the Governor of California in issuing the warrant for petitioner's arrest and the apprehension and custody of petitioner by respondent and the intended delivery of petitioner by respondent to agents of the State of Georgia all constitute state action by the State of California within the meaning of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. The action of the State of California set forth in paragraph 2 of these Conclusions of Law has been and is based upon the judgment and sentence entered against petitioner on February 8, 1935, by the Superior Court of Bibb County, State of Georgia, and was performed and is being performed in order to effectuate said judgment and sentence and thereby renders the State of California an active participant in the effectuation of said judgment and sentence.

4. In the proceedings before it on February 8, 1935, the Superior Court of Bibb County, State of Georgia, failed to afford petitioner counsel and thereby deprived him of due process of law, in [93] violation of the Fourteenth Amendment to the Constitution of the United States.

5. In the proceedings before it on February 8, 1935, the Superior Court of Bibb County, State of

Georgia, entered its judgment and sentence against petitioner without a plea of guilty by petitioner and without a trial of issues of fact and thereby deprived petitioner of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

6. The treatment accorded petitioner in the Walton County Public Works Camp of the State of Georgia, as set forth in paragraph 5 of the above Findings of Fact, constituted cruel, unusual and inhuman punishment, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

7. In the proceedings before it on February 8, 1935, the Superior Court of Bibb County, State of Georgia, sentenced petitioner to cruel, unusual and inhuman punishment and made such sentence an inseparable part of its judgment and sentence against petitioner and thereby deprived petitioner of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

8. Because petitioner has been deprived of due process of law as set forth in paragraphs 4, 5, 6 and 7 of these Conclusions of Law, the judgment and sentence made and entered against him by the Superior Court of Bibb County, State of Georgia, on February 8, 1935, were and are void and without jurisdiction.

9. The action of the State of California set forth in paragraph 2 of the foregoing Findings of Fact and paragraphs 2 and 3 of these Conclusions of Law are, by virtue of the conclusions set forth in paragraphs 4, 5, 6, 7 and 8 of these Conclusions of Law, void and without jurisdiction.

10. There is now, and at all times herein material there was, available to petitioner in California no remedy against the action [94] of the State of California set forth in paragraph 2 of the foregoing Findings of Fact and paragraphs 2, 3 and 9 of these Conclusions of Law, other than petition for a writ of habeas corpus; petitioner, by reason of the facts set forth in paragraph 8 of the foregoing Findings of Fact, has fully exhausted his available remedies in the courts of the State of California.

11. In the event petitioner should be returned to the State of Georgia and required to complete the sentence passed upon him by the Superior Court of Bibb County, State of Georgia, on February 8, 1935, he will again be subjected to cruel, unusual and inhuman punishment, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; and by reason thereof the action of the State of California set forth in paragraph 2 of the foregoing Findings of Fact and paragraphs 2 and 3 of these Conclusions of Law is void and without jursidiction in that it deprives petitioner of due process of law, in violation of the Fourteenth Amedment to the Constitution of the United States.

12. The custody of petitioner by respondent is void and without jurisdiction and petitioner is now entitled to immediate release from the custody of respondent and from apprehension and custody by any other officers of the State of California based upon the warrant of the Governor of that State, or any other warrant issued by said Governor based upon the requisition of the Governor of Georgia, or any requisition by that Governor seeking the return of petitioner to the State of Georgia for the purpose of completing the term or terms of his sentence or sentences imposed by the Superior Court of Bibb County, State of Georgia, on February 8, 1935.

13. Petitioner is entitled to his immediate and unconditional release, and the writ of habeas corpus is discharged.

14. The conclusions of law contained in the opinion of the court filed February 3, 1950, are by this reference incorporated in these Findings of Fact as fully as if set forth in haec verba. [95]

15. All motions on behalf of the respondent to discharge the writ on the ground that the petitioner's petition failed to state facts sufficient to constitute a cause of action and also on jurisdictional grounds, and other grounds indicated in the reporter's transcript which were taken under submission and not ruled on during the trial, are hereby overruled. All objections to the admission of testimony and other evidence, and motions to strike testimony and other evidence, made by respondent and taken

under submission by the court and not ruled upon during the trial, are hereby overruled.

Dated this 2nd day of May, 1950.

/s/ JAMES M. CARTER,
District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 2, 1950. [96]

In the District Court of the United States of America, Southern District of California, Central Division.

No. 10586-C Civil

In re:

Application of Sylvester Middlebrooks, Jr., for a writ of Habeas Corpus.

JUDGMENT

The Findings of Fact and Conclusions of Law herein having been duly signed and filed:

It is ordered, adjudged and decreed that petitioner be unconditionally released and that the writ of habeas corpus heretofore issued and served upon respondent be discharged. This judgment shall be stayed but shall become final upon the expiration of the time within which respondent may appeal, in the event respondent takes no appeal, or in the event respondent does take an appeal, during the pendency of said appeal. Petitioner shall continue to

be enlarged upon bond pending an appeal and during an appeal upon the terms and conditions of the Court's order of February 3, 1950.

Dated this 2nd day of May, 1950.

/s/ JAMES M. CARTER,
District Judge.

Judgment entered May 2, 1950.
Book 65, Page 510.

EDUMUND L. SMITH, Clerk,

By C. A. SIMMONS, Deputy.

[Endorsed]: Filed May 2, 1950.

[Title of District Court and Cause.]

APPLICATION FOR ALLOWANCE OF AN APPEAL BY RESPONDENT, JOHN D. ROSS, SHERIFF OF SANTA BARBARA COUNTY, CALIFORNIA, AND FOR THE ISSUANCE OF A CERTIFICATE OF PROBABLE CAUSE.

Comes now the respondent, John D. Ross, Sheriff of Santa Barbara County, California, and respectfully makes application pursuant to the provisions of Section 2253 of Title 28, United States Code, for the allowance by respondent of an appeal from the decision, findings of fact, conclusions of law, and the judgment and order of the Court filed in the

above entitled cause on or about May 2, 1950, in the office of the Clerk of said Court.

1. Respondent respectfully represents that the Governor of California on or about the 13th day of September, 1949, issued a rendition warrant authroizing the arrest of petitioner, Sylvester Middlebrooks, Jr., as a fugitive from justice from the State of Georgia; that the Governor's warrant was issued pursuant to the receipt from the Governor of Georgia in the form and manner provided by Article IV, Section 2, Clause 2 of the Constitution of the United States, the Act of Congress regulating interstate extraditions (Section 3182 of Title 18, U.S.C.) and the provisions of the Uniform Extradition Act of the State of California; that the respondent thereupon apprehended and took into custody Sylvester Middlebrooks, Jr., in accordance with the rendition warrant issued by the Governor of California.

2. Respondent further represents that the Court by its decision, findings of fact, conclusions of law, and judgment and order filed in the office of the Clerk on or about May 2, 1950, in the above entitled habeas corpus proceeding, ordered the release and discharge of the petitioner named in such fugitive warrant from the custody of the respondent.

3. Respondent further represents that the constitutional question is involved as to whether the action of the Governor of California in issuing a warrant for petitioner's arrest as a fugitive from justice from the State of Georgia constituted state action

by the State of California in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

4. Respondent further represents that the constitutional question is involved in the above entitled cause as to whether the due process clause of the Fourteenth Amendment of the United States Constitution prevails over the provisions of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress regulating interstate extraditions (Section 3182, Title 18, U.S.C.). The Court's holding to the effect that the Fourteenth Amendment prevails over such provisions nullifies the operating effectiveness of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress regulating interstate extraditions. (Section 3182, Title 18, U.S.C.).

5. Respondent further represents that more than one-half [100] of the states of the United States, including the State of California, have enacted a uniform extradition act; that several such provisions of the Uniform Extradition Act, to wit, specifically Sections 1548.2, 1549.2, 1549.3, 1553.2 of the Penal Code of the State of California, are adversely affected by the ruling of the Court in the above entitled action to the extent that the operating effectiveness of such provisions are nullified by the holding of the Court that such named statutes were operative against petitioner Sylvester Middlebrooks, Jr., for unconstitutional purposes and with unconstitutional results, and in violation of the due

process clause of the Fourteenth Amendment of the Constitution of the United States.

6. Respondent further represents that the above entitled cause involves the constitutional question of whether the Eighth Amendment of the Constitution of the United States is applicable to the states of the Union.

7. Respondent further represents that the above entitled cause involves the question of whether the Fourteenth Amendment of the Constitution of the United States incorporates or does not incorporate the Eighth Amendment of the Constitution of the United States so as to make the same applicable to the states of the Union.

8. Respondent further represents that the issue is involved as to whether the infliction of cruel and unusual punishment by a demanding state in an extradition case is a litigable issue at the rendition stage and whether the infliction of such punishment in any event would require a complete release of the petitioner on his petition for a writ of habeas corpus.

9. Respondent further represents that there is involved the question in the above entitled cause as to whether remedies of the State of California were shown to have been exhausted by petitioner in view of the fact that petitioner failed to file [101] a petition for certiorari to the Supreme Court of the United States from a judgment of the Supreme

Court of California refusing relief to petitioner on his petition for a writ of habeas corpus.

10. Respondent further represents that there is involved in the above entitled cause the question of whether the petitioner at the rendition stage was entitled to relief in view of the fact that the remedies of the State of Georgia, the demanding state, were not shown to have been exhausted, and no showing made of the exhaustion of remedies available to the petitioner in the federal courts having territorial jurisdiction over the State of Georgia.

11. Respondent further represents that there is involved in the above entitled cause the question of whether the permissible scope of inquiry in an application for habeas corpus in cases having an extradition basis is limited at the rendition stage to (1) whether the person demanded has been substantially charged with crime in the demanding state, and (2) whether he is a fugitive from justice of the demanding state, or whether the permissible scope of inquiry at the rendition stage includes inquiries into issues as to whether petitioner was denied assistance of counsel in the demanding state, whether there were irregularities or violations of constitutional rights in connection with commitment and conviction for alleged offenses committed in the demanding state, and whether petitioner was subjected to cruel and unusual punishment while confined within a penitentiary in the demanding state.

12. Respondent further represents that there is

involved in the above entitled cause issues as to whether the petition for a writ states facts sufficient to constitute a cause of action, and whether the Court in the above entitled cause in discharging the petitioner from the custody of the respondent [102] sheriff exceeded its jurisdiction.

13. Respondent further represents that there are legal issues involved with respect to the overruling by the Court of objections by respondent of the admission of certain testimony and evidence at the hearing of the trial in the above entitled cause.

14. Respondent further represents that he is desirous of appealing from the decision, findings of fact, conclusions of law, judgment and order of the Court, and all matters relating thereto, filed in the above entitled cause on or about May 2, 1950, in the office of the Clerk of said Court.

Wherefore, respondent prays that the Court issue its order allowing said respondent John D. Ross, Sheriff of Santa Barbara County, California, to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decision, findings of fact, conclusions of law, judgment and order of the Court entered in the above entitled cause, and to issue a certificate of probable cause for such appeal.

Dated this 4th day of May, 1950.

DAVID S. LICKER,
District Attorney of the
County of Santa Barbara.

VERN B. THOMAS,
Assistant District Attorney of the County of Santa Barbara.

By /s/ VERN B. THOMAS,
Attorneys for Respondent, John D. Ross, Sheriff of Santa Barbara County, California. [103]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 8, 1950.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND CERTIFICATE OF PROBABLE CAUSE

The respondent, John D. Ross, Sheriff of Santa Barbara County, California, having made application to the Court for the allowance of an appeal and due notice of such application having been made, and it appearing to the Court that the application for the allowance of an appeal was made in good faith, and that there is probable cause for the taking of the same, and the Court being fully advised in the premises.

It Is Hereby Ordered, Adjudged and Decreed that the respondent, John D. Ross, Sheriff of Santa Barbara County, California, be and hereby is permitted to appeal to the United States Circuit Court

of Appeals for the Ninth Circuit from the decision, findings of fact, conclusions of law, judgment and order in the above-entitled cause, and all matters relating thereto, entered and filed in the office of the Clerk on or about May 2, 1950.

It Is Further Ordered, Adjudged and Decreed that there is [105] probable cause for the taking of such appeal.

Dated this 8th day of May, 1950.

/s/ JAMES M. CARTER,
District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 8, 1950. [107]

[Title of District Court and Cause.]

APPOINTMENT OF ATTORNEYS

I, Sylvester Middlebrooks, Jr., hereby appoint and retain A. L. Wirin and Loren Miller, of Los Angeles, and Elizabeth Murray, of Santa Barbara, to represent me as my attorneys in and before the United States Court of Appeals, Ninth Circuit, in connection with any appeal that has been or may be taken from the Judgment in a proceeding entitled in re: Application of Sylvester Middlebrooks, Jr., for a Writ of Habeas Corpus (file No. 10586-C) in the District Court of the United States of Amer-

ica, Southern District of California, Central Division.

Dated: This 5th day of May, 1950.

/s/ SYLVESTER MIDDLEBROOKS, JR.,

Affidavit of Service Mail attached.

[Endorsed]: Filed May 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John D. Ross, Sheriff of Santa Barbara County, California, respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decision of the Court, findings of fact, conclusions of law, and final judgment of the Court entered in the above entitled action on May 2, 1950.

Dated this 10th day of May, 1950.

/s/ DAVID S. LICKER,
District Attorney of the
County of Santa Barbara.

/s/ VERN B. THOMAS,
Attorney of the County of Santa Barbara, California.

Attorneys for Appellant John D. Ross, Sheriff of Santa Barbara County, California.

[Endorsed]: Filed May 11, 1950. [110]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To: Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, Central Division.

Will you please take notice that John D. Ross, respondent in the above entitled action, and appellant, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain decision of the Court, all findings of fact, all conclusions of law, and judgment and order filed in the office of the Clerk of said Court on or about May 2, 1950, discharging the relator, Sylvester Middlebrooks, Jr., from the custody of the respondent John D. Ross, Sheriff of Santa Barbara County, California, and from each and every part of said decision, findings of fact, conclusions of law, judgment and order, as well as from the whole thereof, and the respondent John D. Ross hereby requests and designates that there be made up and prepared a complete record in bulk on appeal of all proceedings and all matters relating to the above entitled cause, including the pleadings and exhibits attached [111] thereto, all findings of fact and conclusions of law, disapproval and objections of respondent to petitioner's proposed findings of fact, conclusions of law and judgment, the opinion of the Court, the order of the Court of February 7, 1950

releasing the petitioner on bail, the judgment of the Court, application for allowance of an appeal and issuance of a certificate of probable cause, order allowing appeal and certificate of probable cause, notice of appeal, and reporter's transcript of all of the testimony and evidence offered or taken or received, objections and motions of counsel, and all rulings of the Court, and all briefs.

Dated this 11th day of May, 1950.

DAVID S. LICKER,
District Attorney of the County of Santa Barbara.

VERN B. THOMAS,
Assistant District Attorney of the County of Santa Barbara.

By /s/ VERN B. THOMAS,
Attorneys for Respondent, John D. Ross, Sheriff of Santa Barbara County, California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 12, 1950. [113]

In the United States District Court, Southern District of California, Central Division.

Honorable James M. Carter, Judge presiding.

No. 10586-C

In re:
APPLICATION OF SYLVESTER MIDDLEBROOKS, JR., FOR A WRIT OF HABEAS CORPUS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, December 20, 1949

Appearances:

For the Petitioner:
MARGOLIS & McTERNAN, by
JOHN T. McTERNAN, Esq.,
HERBERT SIMMONS, JR.

For the Respondent:
DAVID S. LICKER,
District Attorney of the County of Santa Barbara, California, by

VERN B. THOMAS, ESQ.,
Assistant District Attorney of the County of Santa Barbara, California. [1]

The Clerk: No. 10586-C, Civil, Sylvester Middlebrooks, Jr. v. The Sheriff of Santa Barbara County, hearing on return of writ of habeas corpus.

Mr. Thomas: Your Honor, I was advised by telegram under date of December 17th, by Eugene Cook, Attorney General of the State of Georgia, that he had forwarded to the court on that day the brief and desired to appear in the case as amicus curiae.

The Court: The brief was received. The original was received by me. I will hand it to the clerk. An order will be made permitting the filing of the brief and the association solely for the purpose of the brief as amicus curiae, so you won't have to serve counsel with any other documents. Obviously he is not going to appear personally, and the briefs will be ordered filed.

Have you prepared a return?

The Clerk: Yes, I am filing it.

Mr. Thomas: The return has been filed with the memorandum.

The Court: Is the petitioner present?

Mr. McTernan: Yes, he sits alongside of me at counsel table.

The Court: The record will show the Sheriff of Santa [2*]
Barbara County produced the petitioner pursuant to the writ.

The issues in a habeas corpus case are raised by

*** Page numbering appearing at top of page of original Reporter's Transcript.**

a traverse to the return. What is your pleasure on that?

Mr. McTernan: Your Honor, we have certain evidence that we will offer in support of the allegations of the petition. Before doing that, however, I would like an opportunity to make an opening statement to your Honor.

The Court: Before we get to that, then, is it satisfactory to both sides to treat the petition for the writ of habeas corpus as the traverse to the return? The issues in your habeas corpus proceedings aren't raised by the petition for the writ and the return, they are raised by the return and what is called a traverse. That, in substance, is what is in your petition for the writ. So, if satisfactory, we will consider your petition for the writ of habeas corpus as the traverse to the return.

Mr. McTernan: That is satisfactory with us, your Honor.

The Court: Is that satisfactory, counsel?

Mr. Thomas: Pardon me just one moment, your Honor.

We will stipulate that the matters set forth in the return of the Sheriff will be considered denied, your Honor, by the petitioner.

Mr. McTernan: Obviously the allegations of the petition set up affirmative matter. We will have to treat it as you suggest. [3]

The Court: The stipulation that they be denied is all right as far as it goes. But as to any affirmative matters, the court will treat the petition as

the traverse. That has been the practice around here. It raises the same issues and your record then is in proper shape.

Do you care to make a statement?

Mr. McTernan: Yes. Before I do, may I enter the appearance of Mr. Herbert Simmons for the petitioner? Mr. Simmons is not in the court room at the moment, your Honor. He will be here.

I will ask leave to make an opening statement, if the court please, because we are presenting what we consider to be somewhat novel theories in this matter, and I would like an opportunity to state as briefly as I can to the court the facts which we hope to show and the theory upon which we think the court is justified and would be required under the law to grant the petition which we seek.

The petitioner Sylvester Middlebrooks is a negro from Georgia. He was charged in early 1932 with five acts of burglary and theft. We will show by the evidence here that the acts with which he was charged at that time are the same acts for which he was later indicted. The charge involving these five acts of burglary and theft was made either in the very closing days of 1931 or early in 1932. He had a hearing before the juvenile authorities of Georgia on January 17, 1932. [4] At that time Sylvester Middlebrooks was fourteen years old. As a result of that hearing he was ordered committed to the Georgia Training School for Boys.

I am informed that after his confinement to the

Georgia Training School for Boys, Sylvester Middlebrooks escaped twice. After his second escape he was arrested sometime in either June or July of 1934. He at that time was aged seventeen. He was held in jail from the time of his arrest for a period of seven or eight months without counsel and without charges having been served upon him or handed to him. In November, 1934 an indictment was returned by the Grand Jury of Bibb County, Georgia, charging Sylvester Middlebrooks with five acts of burglary and theft, which, as I said before, were the five acts with which he was charged as a fourteen-year-old juvenile.

In this respect a significant disparity in the record will appear. On January 7, 1932 at the alleged juvenile hearing it is stated in the records of Georgia that Sylvester Middlebrooks admitted five burglaries and thefts against five named individuals involving the breaking and entering of their homes, and the removal of personal property therefrom. The indictment which was returned in November, 1934, charges five acts of burglary and theft against the same named individuals whose names appear in the record of the juvenile proceedings, and of these five acts of theft, four are alleged [5] to have occurred at a date following January 7, 1932 by as much as six or seven months. So that the record of Georgia, which states that Sylvester Middlebrooks admitted four acts of burglary and theft were alleged in the indictment of the Grand Jury to have occurred six or seven months after the date on which he is alleged to have admitted them.

After the return of this indictment the record from the State of Georgia will show that the defendant waived formal arraignment, that the defendant pled guilty to each of the five counts; and there is no entry in the portion of the record provided therefor of the name of the defendant's attorney. This occurred, according to the Georgia record, on February 8, 1935, some seven or eight months after arrest.

We will show by oral testimony that the record is untrue; that the defendant Sylvester Middlebrooks did not receive a copy of the indictment or any other information concerning the charges, except a statement by the judge that he had violated the laws of Georgia; that he did not plead guilty; that, in fact, he said he had not violated the laws of Georgia and he wanted a trial before a jury, and that after he said that the judge passed sentence upon him, ordering him committed for one year on each count, the sentences to run consecutively; and that, in fact, there was neither a plea of guilty nor a trial, and that after his imprisonment pursuant to this sentence Sylvester Middlebrooks was held under [6] conditions which any civilized nation would regard as intolerable and violative of the basic standards of decency, and that Mr. Middlebrooks ecaped from these conditions which can only be described as cruel and unusual punishment, and later entered the Army of the United States; that he deserted during his period of service, he was apprehended, tried before a

Court Martial, convicted, sentenced and served a sentence in excess of three years, at the end of which he was arrested on a fugitive warrant requested by the State of Georgia.

We will also show as the petition alleges — I think it probably will be admitted as facts, your Honor — that following his apprehension by the California authorities pursuant to the fugitive warrant requested by the State of Georgia, he sought relief by application for writ of habeas corpus to the Superior Court in and for the County of Santa Barbara; that after hearing, that application was denied; that application was subsequently made to the District Court of Appeals in the appropriate district, and that was denied; thereafter petition for writ of habeas corpus was filed with the Supreme Court of the State of California and that was denied; thereafter application for a stay pending the filing of a petition for certiorari with the United States Supreme Court was made to Mr. Justice Douglas, the supervising Justice of this Circuit, and that application was denied without [7] prejudice. You know Mr. Justice Douglas has been convalescing with injuries. We don't know why he denied it without prejudice. probably in his circumstances he was unable to give it full consideration. The application was then presented to a Justice of the United States Supreme Court in Washington, Mr. Justice Black, and it was by Mr. Justice Black denied. Thereafter a petition for writ of habeas corpus was filed with this court, and this

court granted an alternative writ which was returned today. By this application, your Honor, we seek release from California's custody, not Georgia's custody. We ask relief from custody imposed by California. We assert that custody in California is in violation of the Constitution of the United States in that it deprives this petitioner of due proces of law. It is the action of the State of California about which we complain in this proceeding. It was California that took Sylvester Middlebrooks into custody at the request of the Georgia authorities. It was California's fugitive warrant that was the means of his arrest. It was the California jails which held him. It was California's governor who consented to turn him over to Georgia. It was California's law enforcement agency, the District Attorney of Santa Barbara County, which asserted the rights and powers of California to hold Sylvester Middlebrooks and to turn him over to Georgia. And it was California's courts which in denying Middlebrooks' successive petitions approved his being turned over to Georgia. [8] And, finally, it is California's jailers who today stand ready to turn Middlebrooks over to Georgia should this court relax its protection under the Constitution of the United States. It is because of these acts that California denied Middlebrooks' due proces of law. It is because of that that we seek relief by habeas corpus in this proceeding.

Now, we reach these conclusions, if the court please, by two lines of reasoning, which are closely

similar and which we believe complement each other. The first is that California was without jurisdiction to act, and its proceedings were, therefore, without due process of law. This lack of jurisdiction of California to act depends upon three factors. In the first place, Sylvester Middlebrooks was deprived of counsel in the felony prosecution before the Georgia Court in Bibb County. This shows on the face of the papers which were sent to California as the basis for the request for rendition. We are here prepared to show these facts in greater detail. And this defect in the proceedings of Georgia was jurisdictional under cases which we will discuss with your Honor at a later point in this proceeding. Therefore Middlebrooks was not convicted under the laws of Georgia, and there is, therefore, no basis for California holding him and returning him to Georgia.

Secondly, Middlebrooks was deprived of a trial. The Georgia records, which will be before this court in a moment, [9] show that a seventeen-year-old boy waived formal arraignment and reading of the indictment and pled guilty to five felony counts carrying very heavy sentences. Whether a seventeen-year-old boy without counsel and unfamiliar with the procedures of a criminal court could effectively make such a waiver as a matter of law is something for this court to decide on the basis of the facts which we intend to present here. But we will show that in fact there was no such waiver; that when he was brought before that judge, the judge

said, "Why do you go about violating the laws of this State?" To which Middlebrooks said he had violated no laws and he wanted a lawyer and he wanted a jury trial, and instead he was sentenced to five years in the state prison. So there was no trial, there was no valid proceeding by which a sentence was validly passed, and therefore Middlebrooks was not tried and convicted, and there is, therefore, no basis for California holding him at the request of Georgia.

Thirdly, Middlebrooks has not fled from justice. On the contrary, he has fled from a barbaric system of criminology which has stained the reputations of the slave-traders themselves. This is the system which the United States Court of Appeals for the Third Circuit has described as the infliction of cruel and unusual punishment, and as a failure by the State of Georgia, and I quote, "in its duty as one of the sovereign states of the United States to treat its [10] convicts with decency and with humanity."

I am quoting, if the court please, from the case of Johnson vs. Dye, 175 Fed. (2d) at page 256.

Thus for these three reasons there is no basis in law under the Constitution of the United States for the action taken and about to be taken by the State of California. Sylvester Middlebrooks was not a fugitive from justice, he was not a fugitive from a conviction properly arrived at, and therefore for the State of California to hold him at the request of the State of Georgia was a holding with-

out proper basis in the law, and therefore is a holding without due process of law.

Our second line of reasoning is very close to what has already been said. In this matter California, if the court please, does not act alone, it acts at the request of Georgia. There is, therefore, a concerted action involving both states, and in the present posture of the case, it is the action of California which is the key and of controlling importance. The action of the State of California is the means whereby the action already taken and proposed to be taken by the State of Georgia can be effectuated. Thus California becomes a participant in the deprivations of constitutional rights which I have just indicated, and which we stand ready to prove here today. By holding Sylvester Middlebrooks and by turning him over to Georgia, California participates in the punishment [11] of a man convicted as a boy seventeen years old without counsel; California participates in the punishment of a man convicted as a seventeen-year-old boy without a trial; and California participates in the heinous Georgia chain-gang system whereby all convicts, but especially Negro convicts, are treated in a way that casts a blot upon American civilization in a way that denies to the State of Georgia the right to be treated as a sister state in the American Commonwealth, entitled to call back from another state a man to be subjected to this kind of thing.

As we have said, it is California's action in depriving Middlebrooks of his constitutional rights which constitutes the basis for our petition here.

I would like to suggest, if the court please, an analogy. We recognize in submitting this theory to the court that we are submitting something which is somewhat novel, but we submit that it has ample basis in both reason and in principle, and in analogy to other fields of the law. I would like to call to your Honor's attention, if I may, the restrictive covenant cases. It was the old thesis upon which California courts and the courts of nearly every state in this Union operated, that restrictive covenants were simply private agreements, that the Constitution gave no protection against the private acts of private parties, and therefore the constitutional grounds so repeatedly urged for the non-enforcement [12] of these covenants were ignored and disregarded by the courts. But it was finally perceived that these covenants, while they were private agreements, were literally scraps of paper, unless they were enforced by courts; the objectives of the restrictive covenants were attained not by the private bond of private individuals, but by decrees entered by courts of law, and thus it was clear that it was State action, the action of the State Courts which prevented the use of their own homes by Negro citizens who had purchased them. Once this was clear, the Supreme Court was quick to strike down State Court decrees enforcing restrictive covenants because it was quickly seen that the State Court decree was the crucial factor in the case, and that that State Court decree denied equal protection

of the law and due process of law under the Fourteenth Amendment.

So here, the old thesis has been that the rendition of a fugitive by the asylum state was a mere ministerial act. As long as there was a charge or a conviction in the requesting state, if the person in custody was, in fact, the fugitive requested, or, in fact and in law, a fugitive, or, finally, if the papers were properly made out, then under the old theory the asylum state had no alternative but to render up the fugitive to permit his delivery to the requesting state.

But there is evident in the law a new trend. One in which the asylum state recognizes that it has responsibilities [13] in this process commensurate with the importance of its power; a recognition that the asylum state is the state which provides the necessary and key action, state action, which turns the fugitive back to what is in this case euphoniously called justice. And this recognition, therefore, leads to the conclusion that the asylum state will act only when its action conforms with due process of law. And in recognizing this constitutional responsibility, the asylum state has examined its action in light of and in connection with the action of the requesting state, and when these together show a deprivation of due process, rendition has been denied.

This, your Honor, is something which is receiving growing recognition both in the courts and by the text writers. May I call your attention to a note

in 47 Columbia Law Review at page 470. I think it is cited in our memorandum of points and authorities, but I am not sure, where the writer indicates the old thesis which I have described and comments upon several cases in which the asylum state recognizing the responsibility to examine its own action and the constitutional consequences of its own action has opened the record on habeas corpus proceedings to take evidence on such things as the danger of lynching if the fugitive is returned. That was the Mattox case, Mattox vs. Superintendent of County Prisons, 152 Penn. Sup. 167. Another case in New York in which the [14] court received evidence concerning the cruel and inhuman punishment against the fugitive prior to his escape is Reed vs. Warden, City Prison, 63 Sup. (2d) 620. And the case of Johnson vs. Dye in the Pennsylvania courts, 49 Atl. (2d) 195, where the State Court took evidence on the irregularity of the trial and the probability of future maltreatment of the fugitive should he be returned to the requesting state, which happened, also, to be Georgia.

There are a number of unreported cases on the subject, your Honor, which are collected in this Law Review note, and which I believe are also indicated in our memorandum of points and authorities.

Finally, there is the case of Johnson vs. Dye in the Third Circuit, 175 Fed. (2d) 250, in which on habeas corpus, in proceedings closely similar to the one here, because in the Johnson vs. Dye litigation the fugitive had sought habeas corpus unsuccessfully

in the State Courts, although he had not exhausted the State Courts procedures and had then gone into the Federal Courts seeking a writ of habeas corpus, and there the court took evidence on three contentions: first, that he was convicted as a result of perjured testimony compelled by state authorities; secondly, that he had been forced to serve in a chain gang and submitted to cruel and inhuman punishment; and, thirdly, the danger of lynching. And it was on the second of these grounds, the cruel [15] and inhuman punishment ground, that the Third Circuit held that habeas corpus would lie and that the prisoner should be discharged.

That case was later reversed by the United States Supreme Court on a different ground, namely, that it was necessary to exhaust the state procedures of Pennsylvania.

The Court: Let me inquire there. I checked the reference in the Supreme Court reports. Apparently it indicates that certiorari was granted, judgment reversed, and it cites Ex parte Hawk. Was there any discussion reported in any law weekly?

Mr. McTernan: It appears at 18 Law Weekly, page 3418, and the order—

The Court: What was that?

Mr. McTernan: Page 3418. It simply cites the Hawk case. As your Honor knows, the Hawk case rests simply on exhaustion of state remedies.

The Court: I notice the Stanford Law Review has an article this month and it discusses the Johnson vs. Dye case at length. They take the view that

the reversal in the Supreme Court was a reversal on the ground that Judge Biggs had held it wasn't necessary to exhaust state remedies. The article criticizes both parts of Judge Biggs' decision; but they take the view you did, that the reversal must be viewed as having been made upon the ground that the judge in the [16] Circuit held that you need not exhaust state remedies.

Does that complete your statement, rather than argument?

Mr. McTernan: I may have gone a little far in this, your Honor. I did so because I think that many questions are going to come up concerning the admissibility of evidence, and I wanted your Honor to know exactly the theory—

The Court: I am glad to have your theories on this. I am one step ahead of you. I told my law clerk this morning that one problem that would come up would be the analogy of the restrictive covenant cases, although it wasn't referred to in your memorandum. So chalk one up for my side.

Mr. McTernan: I think with that, your Honor, we are ready to proceed.

Mr. Thomas: At this time the respondent sheriff, your Honor, will move the court to discharge, dismiss the writ issued in this case, on the ground that the petition for a writ and counsel's opening statement, neither, state facts sufficient to constitute a cause of action.

If I may at this time, your Honor, I would like to discuss authorities dealing with the matter.

The Court: Let me suggest this. This is an interesting case, aside from the sentimental talk about it. From a legal standpoint it is an interesting proposition. I read over in detail the memorandum filed by the Georgia authorities. It is a very well written memorandum. I have not seen your [17] memorandum here yet. What I would like to do, if satisfactory with you, would be to take your motion under submission at this time without ruling on it, take the evidence in this case which shouldn't be lengthy — should it?

Mr. McTernan: We have no more than two witnesses, your Honor.

The Court: (Continuing) And then discuss your motion and your authorities in the light of what is alleged and what is proved. Is that satisfactory? I think we will save time that way.

Mr. Thomas: That is satisfactory, your Honor.

The Court: Do you care to make any opening statement without discussing in detail the authorities, but a general statement of your position, or do you care to wait on that?

Mr. Thomas: With regard to my position, your Honor, it is simply this: that the tradition and scope of habeas corpus only permits an inquiry into certain phases. Has a demand been made by the governor of a state for the extradition of the prisoner? Is his demand accompanied by certain authenticated documents? And has the prisoner of the demanding state been determined to be a fugitive? And have those facts been certified?

We contend that the evidence in this case, according to our return, clearly shows that the prisoner is now held pursuant to a warrant issued by the governor of the State of [18] California, which was issued pursuant to the receipt of the required documents from the State of Georgia.

The Court: I think I have your position in mind. Proceed.

Mr. McTernan: Mr. Middlebrooks, take the stand, please.

SYLVESTER MIDDLEBROOKS, JR.

the petitioner herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Sylvester Middlebrooks, Jr.

Direct Examination

By Mr. McTernan:

Q. You are the petitioner in this case, Mr. Middlebrooks?

A. Yes.

Mr. Thomas: At this time, your Honor, the respondent sheriff will object to the introduction of any evidence on the ground that the petition and counsel's statement, opening statement, do not constitute a cause of action, and the witness' testimony would be immaterial and not bear on any issue involved.

(Testimony of Sylvester Middlebrooks, Jr.)

The Court: The objection will be overruled, but it will [19] be subject to change by the court's ruling subsequently when we get into the argument on it if the court reaches a decision in your favor. May it be stipulated that counsel's objection may go to all of this line of testimony, counsel, without having to be made each time?

Mr. McTernan: So stipulated.

The Court: All right.

By "this line of testimony" I mean all testimony from this witness.

Mr. McTernan: I take it that counsel's objection really goes to all evidence which we offer, and I am willing to stipulate that it so run without having to be repeated.

The Court: Is that satisfactory?

Mr. Thomas: Satisfactory.

Q. By Mr. McTernan: Mr. Middlebrooks, when were you born?

A. 1917, February 11th.

Q. Where were you born?

A. Macon, Georgia, Bibb County.

Q. Did you live there continuously until the year 1931?

A. Yes, sir.

Q. In 1931 or early 1932 were you arrested?

A. Yes, sir.

Q. Was that by authorities in the State of Georgia? [20]

A. Yes, sir.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. At that time did they accuse you of having committed a crime?

A. Yes, sir.

Q. What did they accuse you of having done?

A. Burglary.

Q. Did they accuse you of more than one act of burglary, if you recall?

A. Yes, sir.

Q. Do you recall how many?

A. Five.

Q. At that time, Mr. Middlebrooks, did they hand you any paper or writing which contained any statements with reference to these burglaries that they accused you of?

A. No, sir.

Q. Were you taken before a court?

A. Yes, sir.

Q. Do you remember the name of the court?

A. Do you mean in this Federal Court — I mean Supreme Court?

Q. I am referring to the time when you were arrested in either late '31 or early '32.

A. In Juvenile Court.

Q. Was a judge there, and some proceedings in front of a judge? [21]

A. I don't know, sir, who all was in there, but I know there was quite a few people in there.

Q. Do you know what happened in that proceeding?

A. I was sent to the reformatory from there.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Going back a moment, at the time of your arrest were you living with your family?

A. Yes, sir.

Q. What did your family consist of at that time?

A. My mother, my father, and sisters, and brother.

Q. What did your father do?

A. He was a fireman.

Q. Do you mean on a railroad?

A. No, sir. It is a place called Blind Eye Academy.

Q. An academy named what?

A. Blind Eye, that is all I know.

Q. Blind Man?

A. Blind Eye Academy. It is for blind children, it is a big school.

The Court: An academy for blind people?

The Witness: Yes, sir, a school.

Q. (By Mr. McTernan): Prior to the time you were arrested on this occasion, had you gone to school?

A. Not much.

Q. What was the last grade in school that you were in before you left school? [22]

A. Third grade, I think it was.

Q. How old were you when you left school?

A. Around thirteen, I imagine, twelve, something like that.

Q. Did you finish the third grade?

A. No, sir, I didn't complete it.

Q. Had you ever been in a court of law before?

(Testimony of Sylvester Middlebrooks, Jr.)

A. No, sir, I hadn't.

Mr. McTernan: Your Honor, I offer as Petitioner's Exhibit 1 a document which I have shown counsel, a certified copy of a juvenile case record in the name of Sylvester Middlebrooks.

The Court: Subject to the objection of counsel heretofore made by stipulation it will be received in evidence as Petitioner's Exhibit first in order.

The Clerk: Petitioner's Exhibit 1 in evidence.

(The document referred to was marked Petitioner's Exhibit 1, and was received in evidence.)

PETITIONER'S EXHIBIT No. 1

Case No. 3034

Name of child, Sylvester Middlebrooks.

Age 14, sex M, color C.

Birth, February 11, 1917.

Lives with parents.

Residence, 115 Hawkins Avenue.

Complainant, Superior Court.

Complaint, burglary.

Father, Sylvester Middlebrooks.

Mother, Willa Middlebrooks.

(Testimony of Sylvester Middlebrooks, Jr.)
Report of investigation, admits aiding and leading in 8 burglaries—Mrs. Bishop, J. A. Smith, A. W. McClure, J. A. Hunt, Clifford McKay, Mr. Chandler and two houses he pointed out.

Date of hearing, January 7, 1932.

Disposition, committed to Georgia Training School for Boys.

Certified to be a true copy.

/s/ ALICE DENTON,
Clerk of Juvenile Court,
Bibb County, Georgia.

Admitted Dec. 20, 1949.

Q. (By Mr. McTernan): You say that you were sent to a reformatory after that juvenile hearing. Was the name of that reformatory the Georgia Training School for Boys?

A. Yes.

Q. And can you recall approximately the date of that hearing?

A. No, sir, I don't. [23]

Q. Does the date January 7, 1932, refresh your recollection in any respect?

A. I know it was in the wintertime when I was sent there.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Was it in the wintertime when the hearing was held?

A. Yes, I guess it was.

Q. You can't recall any closer than that, whether it was in the month of January?

A. No, sir, I don't remember.

Q. How long did you remain in the Georgia Training School for Boys?

A. The first time I stayed there three months and about two weeks.

Q. Did you run away from there at that time?

A. Yes, sir.

Q. Where did you go?

A. Back to my home.

Q. How long did you remain out of the training school?

A. About a month.

Q. Were you arrested?

A. I was out a month before I was arrested.

Q. After you were arrested were you sent back to the training school?

A. They locked me up in jail and from there I was sent back. [24]

Q. How long did you remain in the training school after you went back?

A. Five months and about two weeks this time.

Q. Did you run away the second time?

A. Yes, sir.

Q. This was sometime in 1932, was it, or had you gone over into 1933?

(Testimony of Sylvester Middlebrooks, Jr.)

A. It was 1933, the last time I ran away from there.

Q. Where did you go the second time that you ran away?

A. I went to New York.

Q. Did you go to New York through South Carolina?

A. Yes, sir, I did.

Q. Did you get in any trouble in South Carolina?

A. No, sir, not at that time.

Q. Were you arrested again in Georgia after your second escape from the training school?

A. Not until I came back in 1934.

Q. About what month was that in 1934 that you were arrested?

A. It was either June or July.

Q. What were you doing in Georgia when you came back that time?

A. I came back home to see my mother and father.

Q. Was your father still a fireman for this academy for the blind? [25]

A. At that time I don't remember.

Q. How old were you, Mr. Middlebrooks, when you came back home in June or July of 1934 to see your family?

A. Seventeen.

Q. When you were arrested this time where were you held?

A. In jail.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Where?

A. Bibb County, Macon, Georgia.

Q. How long did you remain there?

A. From June or July up until February 8th, that is when they tried me, and I stayed there until March, that is when I was taken to the chain gang.

Q. When you were in jail from June or July, 1934, down to February of '35, did you have a lawyer?

A. No, sir.

Q. Did anybody hand you any writing setting forth what you were charged with having done?

A. No, sir.

Q. Did your family come to see you?

A. My mother come to visit me.

Q. Did anybody tell you what you were in jail for at that time?

A. No, sir.

Q. At this time in 1934 when you were arrested, do you [26] know what your father's income was?

A. No, sir, I don't.

Q. Were there other children in the family besides you?

A. Yes, sir.

Q. How many?

A. I have four sisters and one brother.

Q. Was your mother working at that time?

A. I don't remember.

Q. At any time in November, 1934, after you

(Testimony of Sylvester Middlebrooks, Jr.)
were arrested, and while you were in jail there at Macon, Georgia, did anybody hand you a document called an indictment?

A. No, sir.

Mr. McTernan: At this time, your Honor, I offer as Petitioner's Exhibit 2 a document entitled "Indictment, State of Georgia, Bibb County," in five counts, dated in the November term of the court, 1934, and certified by the clerk of the Bibb County Superior Court, State of Georgia, on the 30th day of November, 1948.

Mr. Thomas: It goes in under the same objection.

The Court: It will be admitted in evidence subject to the same general objection heretofore made by counsel.

Mr. McTernan: Your Honor, since this is before you and not before a jury, may I point out that the five counts with which the accused is charged set up names of the victims [27] which are identical with the five named on that juvenile record, which was Petitioner's Exhibit 1, and you will notice that Petitioner's Exhibit 1 recites an admission of the commission of these five acts at a hearing of January 7, 1932, and that the allegations in the indictment as to four of those acts place them as occurring in July and August, 1932.

The Court: Counsel, you only point that out as an irregularity; you don't contend that there is much significance from a legal standpoint attached

(Testimony of Sylvester Middlebrooks, Jr.)
to that, do you? The law of Georgia is probably similar to the law of California and Federal law, that you can allege one date in an indictment and generally prove another. You don't make any particular point that that is denial of due process?

Mr. McTernan: I think it may go, your Honor, to the inference to be drawn from these documents that there was a plea of guilty.

The Court: I have noted your comment on it. I see that the first count refers to Mrs. A. W. McClure. Petitioner's Exhibit 1 shows A. W. McClure.

Count 2 refers to Mrs. James A. Smith, and there is a J. A. Smith on the other document.

Count 3 refers to a dwelling of Clifford McKay, and there is a Clifford McKay on Exhibit 1.

Count 4 refers to the dwelling of W. A. Bishop, and there [28] is a Mrs. Bishop on Petitioner's Exhibit 1.

Count 4 refers to the dwelling of J. A. Hunt, and there is a J. A. Hunt on Petitioner's Exhibit 1.

Mr. McTernan: You will also notice, your Honor, the reverse or the last page of Petitioner's Exhibit 2 where the entries are made concerning the waiver of arraignment and the plea of guilty, there is no entry for the name of the defendant's attorney.

The Court: Is this the only document that we will have in the record showing whether or not petitioner had counsel?

Mr. McTernan: The only other documents that

(Testimony of Sylvester Middlebrooks, Jr.)
we have are the sentences, which are not very helpful on the question.

Q. (By Mr. McTernan): Mr. Middlebrooks, showing you Petitioner's Exhibit 2, at any time before what you have referred to as the trial in February, 1935, was a document similar to that handed to you?

A. There wasn't anything handed to me.

Q. Do you know, or were you ever told whether such document was given to any member of your family or any friend or representative of yours?

A. No, sir.

Q. When were you first told, Mr. Middlebrooks, that you were going to be brought to trial after your arrest in 1934? [29]

A. On the morning of February 8th.

Q. Who told you?

A. The jailer.

Q. Do you remember his name?

A. No, sir, I don't.

Q. What did he say to you?

A. He told me to get ready for trial in about 15 or 20 minutes.

Q. What did you say?

Mr. Thomas: We move that be stricken as hearsay, your Honor. The records of the court would be the best evidence.

The Court: Objection overruled. But, of course, you still have your general objection by stipulation.

A. I wanted to know what I was going to be——

(Testimony of Sylvester Middlebrooks, Jr.)

Q. (By Mr. McTernan): Mr. Middlebrooks, try to state what it is you said, rather than what you wanted. Can you begin your answer with "I said," and then state in substance what you said?

A. Well, I got ready to go when he came for me.

Q. When he told you to be ready for trial in 15 or 20 minutes, did you make a reply to that?

A. I don't know what I was going to be tried for, that was one thing.

Q. Did you say that?

A. I don't remember. [30]

Q. You don't recall whether you made a reply or not, is that right?

A. No, sir.

Q. In 15 or 20 minutes what happened?

A. He came and taken me down to the court room.

Q. When you walked into this court room was there a judge sitting behind a bench?

A. Yes, sir, the judge was sitting behind this bench, and the sheriff was standing there beside him talking in a low voice.

Q. Was there anyone else in the room?

A. No, sir. No more than the jailer that brought me down there.

Q. There were you and the jailer and the sheriff and the judge in the room, is that right?

A. That's right, sir.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Did you hear anybody in that room referred to as a district attorney or as a prosecutor?

A. No, sir.

Q. Did you have anybody there acting as your lawyer?

A. No, sir.

Q. What was said to you and what did you say after you got into the court room? Tell us in the order that it happened as best you remember.

A. After this judge and the sheriff stopped talking in [31] a low tone of voice, the judge called me up in front of him and said, "Don't you know you can't go around breaking the laws of Georgia?" So I told him I hadn't broken any laws of Georgia since I was tried for it in 1932.

The Court: Just a minute. Read the last part.

(The answer was read by the reporter.)

The Witness: That is right.

Q. (By Mr. McTernan): What was said next?

A. I told him I wanted a lawyer and a jury trial. After that he told me, "I could give you five years on each — twenty years on each count," he said, "but I will give you five years in Georgia State Prison. If you come before me again I will give you twenty years." And that was all.

Q. Did you make any statement after the judge said that?

A. No, sir, not that I remember.

Q. How long did this take?

A. About two or three minutes.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Then what happened?

A. The jailer taken me back upstairs.

Q. Back to the cell that you had been in?

A. Yes, sir.

Q. How long did you remain there?

A. The next month a warden and guard came from Monroe, Georgia, from the chain gang, and taken me there. [32]

Q. Going back to your appearance before the judge, were you at that time handed any writing which set forth what you were charged with?

A. No, sir.

Q. Do you remember Petitioner's Exhibit 2, were you handed a copy of that document at that time?

A. No, sir.

Q. Was anything read to you setting forth what you were charged with?

A. No, sir.

Q. Were you asked whether you pled guilty or not guilty?

A. No, sir.

Q. Did you state that you pled guilty to anything?

A. No, sir.

Mr. Thomas: Just a moment. I am going to object to that, your Honor, on the ground that the records of the court would be the best evidence.

The Court: Objection overruled, counsel. The contention here is, for what it is worth, that the records don't show what action transpired. There

(Testimony of Sylvester Middlebrooks, Jr.)
would be no other way to prove what did transpire except by oral testimony.

Q. (By Mr. McTernan): I believe you said you did not have an attorney at that time?

A. That's right, sir.

The Court: We will take a short recess at this time of [33] five minutes.

(A recess was taken.)

The Court: Proceed.

Q. (By Mr. McTernan): After you were returned to your cell, were you taken before a judge at any other time on that day?

A. No, sir.

Q. Or any other day thereafter?

A. No, sir.

The Court: Are those the sentences you are looking at?

Mr. McTernan: Yes.

The Court: Those are the same documents that are included in the return, are they not?

Mr. McTernan: I haven't examined the return.

Mr. Thomas: I believe so, your Honor.

The Court: And a copy of the indictment is in the return, too?

Mr. Thomas: They are all in the return. I haven't had time to check these. I presume they are probably copies.

Mr. McTernan: We were going to offer these,

(Testimony of Sylvester Middlebrooks, Jr.)
your Honor, but we don't want to encumber the record.

The Court: What do you add? There are copies of the sentences for each.

Mr. McTernan: I think the documents we were about to offer are duplicates of the documents attached to the return. [34]

The Court: If you are referring now to the sentence and commitment dated February 8, 1935, Exhibit 2, page 14, 15, 16, 17 and 18 are apparently the same documents as the ones you have.

Mr. McTernan: I think they are, your Honor, and in order to save encumbering the record we can offer those as our documents.

The Court: All right. It is already in evidence by the filing of it, but we will make reference to these pages 14 to 18, inclusive, by reference, 14 to 18 of Exhibit 2, by reference.

The Clerk: Shall I assign them a number, your Honor?

The Court: Yes, assign them a number.

The Clerk: Petitioner's Exhibit 3.

The Court: Any objection to that procedure?

Mr. McTernan: I didn't hear you.

The Court: The return has been filed by the sheriff and is therefore part of the record. Attached to the return as part of Exhibit 2 are pages 14 to 18, inclusive. We will let you offer them in evidence by reference and give them petitioner's numbers in order, 3 to 8, I guess it would be.

(Testimony of Sylvester Middlebrooks, Jr.)

The Clerk: 3, 4, 5, 6 and 7, your Honor.

Mr. McTernan: We so offer them, your Honor.

The Court: All right. Admitted into evidence subject to the general objection stipulated to by counsel. [35]

(The documents referred to were marked Petitioner's Exhibits Nos. 3, 4, 5, 6, 7, and were received in evidence.)

Mr. McTernan: Your Honor, the return sets up the request by the State of Georgia through its governor to the governor of the State of California, which is Exhibit 2, page 6, and there are thereafter a number of documents attached to it, which include the documents already in evidence here as Petitioner's Exhibits 2, 3, 4, 5, 6, and 7.

The Court: Not 2, 3, 4, 5, 6 and 7.

Mr. McTernan: No. 2, also, your Honor.

The Court: Pardon me.

Mr. McTernan: We don't want to encumber the record with a lot of unnecessary documents. I think simply the recognition of that fact, since the return is part of the record, is sufficient.

The Court: That is satisfactory.

Q. (By Mr. McTernan): After you were taken from the jail, Mr. Middlebrooks, in Macon, Georgia, do you recall the name of the place that you were taken to?

A. In 1935?

Q. 1935, yes.

(Testimony of Sylvester Middlebrooks, Jr.)

A. Monroe, Georgia, Warlen County chain gang.

Q. Is that right?

A. Walton County. [36]

Q. Will you describe the place where you were confined at Walton, Georgia? Was it a building?

A. It was a red building, not too large. The white prisoners was on one side and we were on the other side. It was about 40 feet wide, I think, maybe 50 feet, or 60 feet long. The bunks was all very close together, and a lot of us was in there, about 50 or 60 men in the place.

Q. In this place where the 50 or 60 men were, was that broken down into cells, or was it one large area?

A. Just one large area.

Q. What were the approximate dimensions of this area in which the 50 or 60 men were confined?

A. I don't quite understand you there.

Q. How big was this space, Mr. Middlebrooks, how long and how wide, where the 50 or 60 men were?

A. About 40 feet wide and about 50 or 60 feet long.

Q. You say there were bunks in there?

A. Yes.

Q. Were the bunks in tiers or——

A. They were lined up all the way in there.

Q. More than one layer?

A. One up over one.

Q. Were there windows in this area?

(Testimony of Sylvester Middlebrooks, Jr.)

A. There was windows on the side of it. I think one or two windows in the back of it. [37]

Q. How many windows in all?

A. I would say about six, if there were that many. I am not sure.

Q. Were there any toilet facilities in this place?

A. No, sir. The only thing we used was one of these big garbage cans, galvanized cans, that is what we used for a toilet, sitting in the back in the corner, and it leaked and run all over the floor.

Q. How many such cans were there in this space for the 50 or 60 men?

A. Just that one.

Q. Was there a cover over it?

A. No, sir.

Q. How frequently was it emptied?

A. Every morning, I would say. Once a day.

Q. Were the bunks that you described raised off the floor?

A. Yes, sir.

Q. Were any men sleeping on the floor itself or on bedding which was on the floor?

A. No, sir.

Q. Can you describe generally the odors which came from this can?

The Court: Well, the court can take judicial notice of matters of that sort. [38]

Mr. McTernan: Very well.

Q. (By Mr. McTernan): You say this can leaked?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Yes, sir.

Q. How much of the floor, of the area, was covered by what leaked from the can?

A. Well, in the center of the space they have a big stove, and it would come down to that far.

Q. And it would run from the can to the center of the room where the stove was?

A. Yes, sir.

Q. Were you fed in this place, also?

A. No, sir, we wasn't fed in there.

Q. Were you assigned work to do?

A. Yes, sir.

Q. Where did you do the work?

A. Out on the roads.

Q. Will you describe the work which you did?

A. We widened roads, used picks and shovels, widened roads, built highways and built bridges, put pipes under the road.

Q. That is generally the kind of work you and your fellow prisoners were engaged in? What did you personally do?

A. That was the type of work I was doing.

Q. Did you use a pick and shovel? [39]

A. Yes, sir.

Q. Were you shoveling earth or rock or what?

A. Shoveling earth, we shovel rocks, we also load rocks on trucks, big ones, and fill in a mud place, take them big hammers and beat the rocks down to little ones.

Q. You had to break rocks with sledge hammers?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Big hammers.

Q. When you loaded these rocks on trucks, did you have any machines to help you lift them?

A. No, sir.

Q. What hour of the morning did you start work?

A. At the break of day we would go out on the road.

Q. When did you stop work?

A. Dinnertime.

Q. What time of day was that?

A. 12:00 o'clock.

Q. Do you mean at noon?

A. Yes, sir.

Q. How long did you have for your meal at noontime?

A. In the wintertime we had 30 minutes. In the summer we had an hour.

Q. Did you have to work after lunch?

A. Yes, sir.

Q. How long did you work after lunch?

A. We worked until sundown. [40]

Q. I take it, then, that in the winter you had a shorter work day than in the summer?

A. Yes, sir.

Q. Were you fed out there on the job?

A. Yes, sir.

Q. Will you describe the food that you had?

A. We had peas, beans, greens, you know, worms in them, spiders, and everything like that in them,

(Testimony of Sylvester Middlebrooks, Jr.)
it was never clean, the bread was mushy and all like that.

Q. Will you describe whether there was any vermin or foreign matter in the food? Do you know what I mean?

A. No. Come again with that one.

Q. You say you were dished up some beans. Was there anything in the dish besides beans?

A. Yes, sir. You found bugs, spiders, rat manure, all like that was in them.

Q. Was there anything in the bread besides bread?

A. I don't remember any bugs in the bread, I never seen any.

Q. How many meals did you get a day?

A. Three.

Q. Does your testimony concerning the foreign matter in the food apply to each meal each day?

A. Yes, sir, you could always find something in the food. [41]

Q. What effect did this food have on your health, if any?

A. It makes you sick in the stomach, you vomit, and all like that.

Q. Did you see other men suffering the same way?

A. Yes, sir.

Q. Going back to the work you did, I believe you said you did this work in the summertime, as well as in the wintertime?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Yes, sir.

Q. Can you describe the pace at which you worked, whether it was fast or slow or medium?

A. It was fast, they were always rushing you.

Q. Who is "they"?

A. The guards.

Q. How did they rush you?

A. They would curse you and call you all kinds of names.

Q. Did they have any weapons?

A. Yes, sir, they all carried a gun.

Q. Anything else?

A. Sticks.

Q. Did you ever see the guards — first, did the guards ever use their guns or their sticks on you?

A. I have been beaten up several times. [42]

Q. With what?

A. Sticks. I have been kicked, slapped around, too.

Q. By whom?

A. The guards, also the warden.

Q. Was that in the prison itself or out on the road?

A. Out on the roads.

Q. Did you see this happen to other men?

A. Yes, sir.

Q. Other Negro men?

A. Yes, sir.

Q. Other white men?

(Testimony of Sylvester Middlebrooks, Jr.)

A. I seen it happen to just two white fellows there.

Q. Did you Negro men work close by where the white men worked?

A. Yes, sir.

Q. You say these men made you work fast, they rushed you, by hitting you and urging you to work fast. What effect did this have on the men who worked around you?

A. Well, all of us would fall out at times.

Q. Did you ever fall out as a result of this?

A. Yes, sir.

Q. How many times, do you recall?

A. I can't even count them.

Q. When you say "fall out" what do you mean by that?

A. You are overheated, it is hot, and you can't go no [43] further so you just fall out.

Q. On these times when you fell out did you lose consciousness or did you remain conscious?

A. At times. Not all the time, but at times you do.

Q. Were there any doctors or nurses there with the road gang when you were working?

A. No, sir, there was none.

Q. Did these men who fell out in the manner that you described receive any medical treatment that you could see?

A. No, sir; you just lay out there.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. What did the guards do, if anything, when the men fell out?

A. He would kick and knock some of them around trying to make them go on anyway.

Q. Did this happen to you?

A. Yes, sir.

Q. While you were working did you have any manacles or chains on you?

A. I had double shackles on.

Q. Will you describe double shackles, please?

A. It is a cuff on each leg, with a chain running from that one to the other.

Q. This cuff is made of what?

A. Metal.

Q. A metal cuff on each leg connected by a chain? [44]

A. Yes, sir.

Q. About how long was the chain?

A. About like that (indicating).

The Court: Indicating about 14, 16 inches.

Mr. McTernan: Thank you, your Honor.

The Witness: Yes.

Q. (By Mr. McTernan): Do you know what a pict is? A. Yes.

Q. What is it?

A. It has got a round cuff and it has got a sharp point sticking out each way, over the toe of your shoe and behind.

Q. How long are those points?

A. About 10 inches.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. And they are made of what?

A. Metal, iron.

Q. Where are they placed?

A. On your legs.

Q. At the ankles? A. Yes, sir.

Q. Did you ever have those put on you?

A. Yes, sir.

Q. While you were working on the road gang?

A. Yes, sir.

Q. How often did you have picts put on your legs? [45] A. Quite a few times.

Q. Were they put on on special occasions?

A. Yes, sir.

Q. For what reason?

A. Well, if you aren't working to suit them people, you can't satisfy them, then they will slap those picts on you. If they figure you are going to run away they put those picts on you.

Q. What do those picts do to your legs or feet, if anything?

A. It makes it sore down there. It is supposed to trip you if you try to run away.

Q. Going back to these quarters in the prison, will you state whether or not there were any rats or other wild life in the prison?

A. There was rats, roaches, and chinches in the place.

Q. What was the last thing you said?

A. Chinches, little bitty red bugs.

Q. Are they the same as bedbugs?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Yes, the same thing; they bite you.

Q. Did you see these yourself there in the prison? A. Yes, sir; yes, sir.

Q. In this area that you describe?

A. The chinches are always in the bed, little cots.

Q. Did you see these things continually and regularly [46] while you were there, or only on occasion? A. You see them every day.

Q. Will you describe the nature of the mattresses on the bunks?

A. From the time I went there until the time I ran away from there I had the same mattress, the same two blankets, and the same pillow. It was never changed.

Q. Did you have any sheets?

A. No sheets, no pillow cases.

Q. Was this mattress ever cleaned?

A. No, sir.

Q. Were the blankets ever cleaned?

A. No, sir.

Q. Was the pillow ever cleaned?

A. None of it cleaned.

Q. Was it clean when you were given this mattress, pillow and blankets, were they clean at that time?

A. They were clean then. You could see where they had been soiled, but they were cleaned when they give them to you then.

Q. How long did you use the same bedding?

(Testimony of Sylvester Middlebrooks, Jr.)

Q. (By Mr. McTernan): With your arms stretched out in front of you? A. Yes, sir.

Q. Were your wrists in the holes in the stock, also?

A. This thing clamps right across your wrist like that (indicating).

Q. Was there any board over any portion of your legs other than the stock that was over your ankles?

A. Yes, sir, he put a 2 by 4 right across your knees, it was wired down on one side and he put his feet up on one side and press your leg down as far as he could like that, and then he wired it back on that side and leaves you there for one hour.

Q. So this board that was wired across your knees pressed your knees down towards the ground, is that right? A. Yes.

Q. Against the joint rather than with the joint?

A. Yes, sir.

Q. Were you ever placed in that stock? [50]

A. Yes, sir.

Q. More than once?

A. I was in it six times with this thing across it, and I don't know how many times before he start doing that.

Q. What was the reason that men were put in the stock? A. About the work.

Q. You mean their work was not satisfactory?

A. Yes, sir, he would put you on that stock.

Q. On the occasions that you were in the stock

(Testimony of Sylvester Middlebrooks, Jr.)

what was the shortest time you ever sat in the stock?

A. One hour, that was the shortest and the longest.

Q. One what? A. One hour.

Q. One hour? A. Yes.

Q. Did you see men sitting in the stock for longer periods of time?

A. No, sir, I haven't seen any longer than that.

Q. What was the effect of sitting in the stock with the board wired over your knees upon your ability to walk when you were released?

A. You cannot walk when you get up from there, when he takes you off of it. They drag you back into the bullpen and some of the men will take you and put you on your bunk.

Q. The bullpen is this area you described where the [51] bunks were where you lived? A. Yes.

Q. Have you seen other men in the stocks?

A. You can't see them, but they takes them out there and drags them back in.

Q. Have you ever seen any man die after being in that stock?

A. There was one colored boy they drug him back in there and we put him in his bed, and he stayed there two weeks and that is where he died.

Q. At the times that you were in the stock and then dragged out again, did you receive any medical attention of any kind for your legs?

A. No, sir.

Q. Or for any other portion of your body?

(Testimony of Sylvester Middlebrooks, Jr.)

A. No, sir.

Q. What about this man that was dragged out and spent two weeks in his bunk and died, did he get any medical attention?

A. They had a doctor down there, I don't know how many times he was there.

Q. Did they have any recreation facilities there at the prison? A. None whatsoever.

Q. Did they have any church services? [52]

A. No, sir.

Q. What did the men do when they got back to the bullpen from out on the road gang?

A. Stayed in the bullpen, played cards if they wanted to, lay down, anything.

Q. Did they have any church services at the prison? A. No, sir.

Q. Did they have a thing there at that prison called the sweat box? A. Yes, sir.

Q. Describe to the court what the sweat box was.

A. It is a small building, it is made very close, that have little sections in it, and they put you in there with no clothes on and give you two blankets and bread and water.

Q. This is a separate building away from the bullpen? A. Yes, sir.

Q. You say it was subdivided into small sections?

A. Yes.

Q. Can you give us approximately how long and how wide those sections were?

(Testimony of Sylvester Middlebrooks, Jr.)

A. About six feet, I imagine, long, and three feet wide.

Q. How high were they?

A. I don't know exactly how high it is, because it is dark in there, and you can't see. [53]

Q. Was it higher than a man's head?

A. Yes, sir.

Q. There is no light in there at all?

A. No, sir.

Q. Was there any heat in this building?

A. No, sir.

Q. Were you ever put in the sweat box?

A. Yes, sir.

Q. How many times?

A. I don't know exactly how many times I have been in it, but I have stayed in there as much as seven days.

Q. Seven days consecutively? A. Yes, sir.

Q. Have you known of instances of men who have stayed there longer than seven days at a time?

A. Yes, sir.

Q. What is the longest you know of any man staying in a sweat box at one time?

A. Fourteen days.

Q. Were men put in there in winter?

A. Yes, sir.

Q. When they were put in there in the winter-time were their clothes taken off them?

A. Yes, sir.

Q. And given the same two blankets? [54]

(Testimony of Sylvester Middlebrooks, Jr.)

A. Yes, sir.

Q. Were they woolen or cotton blankets?

A. Woolen ones.

Q. Were there any toilet facilities in the sweat box? A. No, sir.

Q. Any at all? A. They give you a pail.

Q. A pail? A. Yes.

Q. That is there in the same room with you?

A. Same room with you.

Q. Were you put in this sweat box in the summertime, also? A. Yes, sir.

Q. Was anything used that you would know of to cool off that sweat box during the summer months in Georgia? A. No, sir.

Q. Incidentally, when you worked in the road gang during the summertime in Georgia did you work out under the sun?

A. Yes, sir, right out in the sun.

Q. Did you have any rest periods during the morning or the afternoon? A. No, sir.

Q. In the sweat box what food did you receive? [55]

A. They gave you bread and water.

Q. How many times a day?

A. Three times a day.

Q. Any variation in that diet from one day to the other?

A. Every third day I think they give you a meal, every third day.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Do you mean a meal similar to the ones you received out on the road?

A. Yes, sir, the same thing.

Q. How many men in each one of the subdivisions of the sweat box, sections, that you describe?

A. If I am not mistaken they could put six or eight in it, I believe.

Q. You say that the sweat box building was divided into sections that measured 6 feet by 3 feet?

A. Yes, sir.

Q. Did they put more than one man in one of those sections?

A. Just one man in one of the little sections.

Q. Did he have any contact with his fellow prisoners or with anybody during the time he was in there? A. No, sir, no one.

Q. Is this what you call solitary?

A. Yes, sir. [56]

Q. What clothing did you wear there in the prison? A. We wore those stripes.

Q. What are they?

A. The pants and a jacket and underwear.

Q. What do the stripes look like? Black and white stripes? A. Yes.

Q. Horizontal?

A. They are circular, goes around, mostly.

Q. Do you know whether they were made of wool or cotton?

A. No, I don't remember what they were made out of.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. Did you get any heavier clothing issued to you in the wintertime?

A. We only get this heavy underwear.

Q. You described a man dying after having been put in the stock. Did you see any prisoners die after being beaten?

A. No, sir, I haven't seen any die.

Q. You said earlier that the guards were armed with guns and sometimes with wooden clubs. Were they ever armed with anything else besides that?

A. No, sir. I only seen them with the sticks and the guns. .

Q. Did you ever see any guards with leather whips?

A. Yes, sir; some men they used to take them down to [57] the barn and handcuff them up on a pole there and whip them.

Q. Did this ever happen to you?

A. Yes, sir.

Q. More than once? A. Yes, sir.

Q. How many times?

A. I don't remember the times.

Q. Why was that done to you? Had you done something which the guards didn't like?

A. It is always on work. You couldn't never satisfy them, and especially the warden, and he was out on the road at all times.

Q. By the work, you mean the work on the road gang? A. Yes, sir.

Q. When you were whipped there were you

(Testimony of Sylvester Middlebrooks, Jr.)
whipped through your clothing or on your bare skin?

A. They take you down to that barn and you pull off your shirt.

Q. And then they strap you up as you have described? A. Yes, sir.

Q. Did you run away from this chain gang?

A. Yes, sir.

Q. When? A. In 1937 I ran away.

Q. What month, do you recall? [58]

A. If I am not mistaken I think it was in March.

Q. March of 1937?

A. I think that is what it was.

Q. Where did you go?

A. I went to South Carolina.

Q. Did you get in some trouble there in South Carolina? A. Yes, sir, I did.

Q. What trouble did you get into?

A. That was a house-breaking, grand larceny they called it.

Q. Were you arrested? A. Yes, sir.

Q. Were you sent to jail?

A. I was sentenced to eighteen months' sentence in the chain gang there.

Q. What kind of a house did you break into there?

A. A dwelling house. People lived in it.

Q. Somebody's residence?

A. People lived in it.

Q. What did you go in there for?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Because I was hungry and I needed clothes. I went there and knocked on the door, I was going to ask for some food, maybe a pair of overalls and shirt. There wasn't nobody there, so I just went in it.

Q. Did you serve in the South Carolina chain gang, also? [59] A. Yes, sir.

Q. Did you run away from there?

A. No, sir.

Q. You served your sentence out?

A. Yes, sir.

Q. After you finished your sentence in South Carolina, what happened to you?

A. They locked me up in jail, and I think I stayed there for a week, then the warden and the guard came from Monroe, Georgia, and taken me back to the chain gang.

Q. Did you go back to the same place in Georgia you had been in Walton County?

A. Yes, sir, the same place.

Q. How long did you serve there at that time?

A. If I am not mistaken it was about a year and thirteen days. I am not too sure of that. But I know it was a little better than a year.

Q. At the time you were brought back to Georgia in—when was it?

A. 1938, I think it was.

Q. Were you brought before a judge again?

A. No, sir.

Q. Just taken right back to the prison?

(Testimony of Sylvester Middlebrooks, Jr.)

A. Straight to the chain gang.

Q. After you had been there about a year or so what [60] happened next?

A. I escaped again.

Q. Where did you go this time?

A. New York.

Q. Did you get in any more trouble after that?

A. No, sir.

Q. Did you go into the Army?

A. I registered for the draft and later I was inducted, and later I went A.W.O.L. there.

The Court: When were you inducted?

The Witness: In 1942, April 23rd, I believe it.

Q. (By Mr. McTernan): Where were you stationed when you went A.W.O.L.?

A. Fort Dix, New Jersey.

The Court: When did you go A.W.O.L.?

The Witness: I think it was August, 1942.

The Court: How long were you A.W.O.L.?

The Witness: Three years, six months and twenty-six days, I think it was. I am not too sure.

The Court: When were you picked up?

The Witness: March 8, 1946.

The Court: When were you sentenced by a court-martial?

The Witness: April 3, 1946, your Honor.

The Court: How long?

The Witness: Fifteen years, dishonorable discharge. [61]

The Court: How much time did you serve?

(Testimony of Sylvester Middlebrooks, Jr.)

The Witness: I served three years, five months and thirteen days, I think.

The Court: You were in New York from 1938 to 1942?

The Witness: No, sir. I escaped in 1939, July 13th.

The Court: So you were in New York from what month in 1939?

The Witness: July.

The Court: July, '39, until you were inducted about April of '42?

The Witness: Yes, sir.

The Court: That is about the only period of time that you weren't getting into trouble?

The Witness: Yes. I only did this in Georgia and South Carolina, that is the only crime I committed.

The Court: You went A.W.O.L. from the Army?

The Witness: Yes, sir.

The Court: What did you do that for?

The Witness: My mother was sick and I wanted to go home and they wouldn't give me any furlough.

The Court: Didn't you go back to Georgia after you went A.W.O.L.?

The Witness: No, sir, I didn't go back.

The Court: Was your mother in Georgia?

The Witness: Yes, sir, she was. [62]

The Court: In other words, you didn't go A.W.O.L. to see your mother?

(Testimony of Sylvester Middlebrooks, Jr.)

The Witness: I did. They didn't give me a furlough. When I went in there they are supposed to give you seven to fourteen or fifteen days, and I didn't get that, and I tried to get a furlough, and I didn't get that, so my mother was sick, and I was intending to go back there, but I thought about what they would do to me, so I didn't go back.

The Court: Nor did you go back to the Army?

The Witness: Yes, I went back to the Army once, but my company was gone, and there was nobody there, so I just left again. I turned in.

The Court: What place did you go back to?

The Witness: Fort Dix.

The Court: Were you in uniform at the time?

The Witness: Yes, sir.

The Court: You went on back to Fort Dix?

The Witness: Yes, sir, I went back and turned in to the provost marshal.

The Court: Why didn't they hold you at that time?

The Witness: They did, they had me down there in what they call a replacement center.

The Court: How long had that been after you went A.W.O.L.?

The Witness: I was only away nine days the first time I went and I came back. [63]

The Court: By that time your company was gone?

The Witness: Yes, my company was gone.

The Court: They put you in a replacement center?

(Testimony of Sylvester Middlebrooks, Jr.)

The Witness: Yes, sir.

The Court: How long did you stay then before you left Fort Dix again?

The Witness: I don't remember exactly.

The Court: Well, was it a short time or long time? I know you can't remember exactly.

The Witness: It wasn't too long.

The Court: Did you stay around a week or two, or were you there several months before you went A.W.O.L. again?

The Witness: I would put it around three to four months. It could have been a little better.

The Court: You think it was three or four months?

The Witness: Weeks.

The Court: All right.

Q. (By Mr. McTernan): It was after you went A.W.O.L. the second time that you were court-martialed, is that right? A. Yes, sir.

Q. And sentenced to Camp Cooke?

A. No, sir. When they sentence you they say something about the reviewing authorities can send you anywhere they want to. So I was sent to Stoneville, New York, a place called Green Haven. I served seventeen months there, and then [64] I was sent out here to Camp Cooke.

Q. Did you escape from any of these Army camps? A. No, sir.

Q. Did you have any trouble of any kind while you were at either of those Army camps?

(Testimony of Sylvester Middlebrooks, Jr.)

A. No, sir, I didn't have any trouble.

Q. Incidentally, when you were in the Georgia prison in the chain gang did you receive any training in a trade? A. No, sir.

Q. Did you receive any training in a trade while you were in the Army prison?

A. Yes, sir, I learned tailoring, and also went to school.

The Court: How far did you get in school in the Army camp?

The Witness: I went up to the tenth grade, but I also got an eighth grade diploma. I stopped in the tenth and went in the tailoring trade.

The Court: It is 12:00 o'clock. Recess until 1:30. Is that satisfactory?

Mr. McTernan: Satisfactory to me, your Honor.

Mr. Thomas: Satisfactory.

The Court: All right.

(Whereupon at 12:00 o'clock noon a recess was taken until 1:30 o'clock p.m. of the same day.) [65]

Los Angeles, California, Tuesday, December 20, 1949. 1:30 P.M.

SYLVESTER MIDDLEBROOKS, JR.

the petitioner herein, called as a witness in his own behalf, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. McTernan:

Q. I just want to go back over a couple of things I overlooked. You described the shackles that were applied to you when you worked on the road gang, chain gang? A. Yes, sir.

Q. Were those shackles removed when you were through with your day's work?

A. No, sir; we slept in them.

Q. You slept in them? A. Yes, sir.

Q. Were you at any time during the course of the day chained to any other prisoner?

A. No, sir.

Q. Each individual prisoner was shackled, is that the idea? A. Yes.

The Court: Did every prisoner in the chain gang have shackles on them? [66]

The Witness: Yes, sir, when I was there.

The Court: Every one of them?

The Witness: Yes.

The Court: And they all slept in them?

The Witness: Yes, sir.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. (By Mr. McTernan): At any time during your stay in the bullpen at the Walton prison, was that bullpen ever invaded by outsiders unconnected with the prison?

A. No, sir. Only except this mob came down there.

Q. When did that happen? A. 1936.

Q. What time of day? A. It was night.

Q. What happened?

A. Two of them came inside and flashed a light in every one of our faces. The fellow they were looking for was not there, and he says, "We ought to string up all of the so-and-so's."

Q. Just say what he said.

A. "All of the black sons-of-bitches."

Mr. Thomas: I am going to object to that, your Honor, on the ground there is no identity of the persons involved, too remote in time, incompetent, irrelevant and immaterial, and hearsay.

The Court: Objection overruled. [67]

Q. (By Mr. McTernan): Did you see these two white men who did this? A. Yes, sir.

Q. Had you ever seen them before?

A. No, sir.

Q. Do you have any basis of knowing whether they were connected with the prison?

A. No, sir, I don't.

Q. Were there any of the prison guards with them?

A. Only the night guard was with them.

(Testimony of Sylvester Middlebrooks, Jr.)

Q. He went with them?

A. He came inside, he unlocked the door and let them in.

Q. Was the guard present when this statement about stringing up you black so-and-so's was made?

A. Yes, sir.

Q. Since there is so much in the testimony with reference to escapes on your part, Mr. Middlebrooks, I want to ask you with reference to the conditions in this training school. In what kind of quarters were you confined in that training school?

A. Up in a dormitory.

The Court: Let's save some time on that. There is no contention here that he be sent back to the training school.

Mr. McTernan: That is correct, your Honor. [68]

The Court: The escapes of a boy of thirteen or fifteen I don't take as being much evidence one way or the other.

Mr. McTernan: Very well. I withdraw the question. You may cross-examine.

Mr. Thomas: At this time, your Honor, on behalf of the respondent I move to strike the evidence of the witness on the following grounds: The evidence is incompetent, irrelevant and immaterial;

(2) Neither the petition requesting a writ, nor counsel's opening statement, states sufficient facts to constitute a cause of action which would warrant the granting of a writ;

(3) That the proffered testimony raises issues

(Testimony of Sylvester Middlebrooks, Jr.)
which are beyond the scope of the jurisdiction of this Court.

The Court: What was the first one? The second one was no cause of action stated, and the third that it is beyond the jurisdiction of the court. What was the first one?

Mr. Thomas: Incompetent, irrelevant and immaterial, your Honor.

The Court: The objection will be overruled, subject to the motion which the Court is taking under submission.

Mr. Thomas: Is the motion taken under submission, your Honor?

The Court: I could take it under submission, but in view [69] of your—I will take it under submission, too, then. Set aside my ruling and I will take it under submission along with the opening objection. I had in mind that the opening objection was broad enough to cover everything. But to save your record I will take this motion under submission, also, and set aside my ruling on it.

Mr. Thomas: No questions.

Mr. McTernan: That is all.

The Court: Step down.

Mr. McTernan: Your Honor, we had a witness here. He stepped out of the court room. I am sure he will be available in just a moment. May I be excused to go to see if I can find him?

The Court: Yes.

Mr. Thomas: May I have my motion read again, please?

(The motion made by Mr. Thomas was read by the reporter.)

Mr. McTernan: Mr. Conkle, will you take the stand, please?

HORACE B. CONKLE

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Horace B. Conkle. [70]

Direct Examination

By Mr. McTernan:

Q. Where do you live? A. Bams——

Mr. Thomas: Just a moment, please. At this time I would like to renew the motion heretofore made with respect to the first witness' testimony, on the ground that neither the petition nor counsel's opening statement states a cause of action which would warrant the granting of a writ.

The Court: The objection is taken under submission, and by a stipulation of counsel it may go to the entire line of testimony.

Mr. McTernan: So stipulated.

Q. (By Mr. McTernan): Where do you live now, Mr. Conkle?

(Testimony of Horace B. Conkle.)

A. Bams Auto Court, Santa Barbara.

Q. Were you ever in the state of Georgia?

A. Yes.

Q. Were you convicted of a crime of burglary in Georgia? A. Yes.

Q. What year? A. 1934.

Q. Following your conviction and sentence did you serve time in a prison in the State of Georgia?

A. Yes.

The Court: Now, can't we save time, or can we? In view [71] of the fact that there was no cross-examination of the last witness, and I take it this is cumulative, can't we stipulate that this witness' testimony would portray substantially the same acts as shown by the petitioner Middlebrooks, or do you have other matters, Mr. McTernan?

Mr. McTernan: If you just give me a moment to go over my notes, I think I can stipulate to that, your Honor. Excuse me just a second.

The Court: On second thought, maybe you had better sketch through some of it if it is similar matter. I am not too concerned about the food. We all know food in jails isn't good. But the conduct, how prisoners were treated, the style of leg irons they wore, when they wore them, and sanitary conditions.

Mr. McTernan: Very well. If your Honor will permit an interruption, I neglected to ask that the appearance of Miss Murray of Santa Barbara be entered as counsel of record.

(Testimony of Horace B. Conkle.)

The Court: What is the first name?

Mr. McTernan: Miss Murray. Elizabeth Murray.

The Court: She will appear of record as attorney for the petitioner.

Q. (By Mr. McTernan): In what prison in Georgia were you confined following your sentence, Mr. Conkle?

A. Colquitt County, Georgia.

Q. In what part of the state is that? [72]

A. In the southern part.

Q. Incidentally, are you familiar with the location of Walton County, Georgia?

A. Yes. I might go so far as to say I am familiar with almost every county in the State of Georgia.

Q. Is Walton County also in the southern part of the state?

A. More southern than any place else; about the southern central, something like that.

Q. Will you describe briefly the nature of the building in which you were confined in the Colquitt County prison?

A. It was a wooden barracks type building with a hallway splitting the colored side from the white side, and each side had three windows in it.

Q. How big was the area on each side of the hallway?

A. Well, both sides were the same size. I would say it was about 16 by 25 or 16 by 35 rooms, there was two rooms that big.

(Testimony of Horace B. Conkle.)

Q. I take it that you and the other white prisoners were in one side of that hallway there and the Negro prisoners were on the other side, is that right? A. That's right.

Q. Will you tell approximately the number of Negro prisoners who were confined on their side?

A. Well, this chain gang that I was on was known in [73] chain gang circles as the nigger chain gang. In other words, I mean by that the colored boys predominated. There was about one hundred, average of one hundred fifteen, twenty men in this particular camp all the time, and it averaged from, I would say from eleven to twenty-five white men. The rest of them were colored.

The Court: All in one building?

The Witness: Yes, sir.

Q. (By Mr. McTernan): In other words, there were about ten to twenty-five white men on one side of the hallway and about one hundred ten Negro men on the other side?

A. No. I guess it would run close to 75 or 80 colored.

Q. On one side of the building?

A. On one side.

Q. And——

A. On the other side was the white boys, which ran from eleven to twenty-five. And there was an average of about, like I say, 115, 120 men there at all times.

Q. When you say 115 to 120, you are talking

(Testimony of Horace B. Conkle.)

about the whole gang, Negro and white together?

A. Yes. You see, where the discrepancy in that comes is the trusties slept in a building to themselves, and there was always from, I would say, 16 to 20 trusties.

Q. Can you describe briefly the sleeping accommodations on the Negro side of this barracks? [74]

A. Well, yes. They had bunks, two- and three-tiered bunks stacked up like that, and they were in line, the head of one bunk would jam the foot of another like that, and they were in lines about, I would say, not more than 30 inches apart, anyway, they had to be very close to get enough bunks in there for all the fellows.

Q. As I get the picture, the head of one bunk was against the foot of the next? A. Yes.

Q. In rows, and there were two rows about 30 inches apart?

A. There was several rows, the rows was 30 inches apart, and I guess there was four or five rows of them. They ran the length of the building.

Q. Will you describe the sanitary facilities in that room where the Negro prisoners were kept?

A. They had two toilet bowls in there and a shower. Of course, this shower, you had to practically stand on the toilet bowls in order to take a shower, when the shower would run, because there was such a limited amount of space there.

Q. Were the toilet bowls equipped with running water? A. Yes.

(Testimony of Horace B. Conkle.)

Q. What kind of heating facilities did they have.

A. They had oil drums, 50-gallon oil drums with a stovepipe in it and a door cut in the side. They used wood [75] for fuel.

Q. How many of such stoves on the Negro side?

A. There was one on the white side and one on the colored side.

Q. Were the prisoners chained? A. Yes.

Q. How?

A. Most of them wore double shacks and an upright.

Q. Describe that, will you?

A. An upright goes from the center of your ankle shack between your legs up to your belt.

Q. In back?

A. In back. And it is used to put the men on building chain at night. When you come in at night there is a guard by the door here and a guard by the door here, and each one of them is holding the end of a chain. Well, this chain, there is a big ring on your upright, and you go on that chain according to your number, and these chains go in a loop down the aisles of these bunks, so that the men sleeping on this side and the men sleeping on this side in this line of bunks can be on that building chain and still be in their bunk.

The Court: What is this upright, a piece of metal?

(Testimony of Horace B. Conkle.)

The Witness: No. It is a chain, too, your Honor.

The Court: From your ankle shackle to your belt? [76]

The Witness: Yes, sir.

Q. (By Mr. McTernan): Did the prisoners wear the ankle shackles and the upright at all times?

A. Sure, there was no way to get it loose. It was riveted—the shacks was riveted to your ankles and the upright was riveted to the center of the cross chain.

Q. On the ankle shackle? A. Yes.

Q. When they returned from working on the road gang to the barracks that you have described, am I correct in understanding that at that time they were put on a chain which was fastened to an upright in the barracks?

A. No. I am sorry, I never did finish explaining that. You go on the chain here, and on this side, the two ends, you see here is a loop down here at the end of the barracks, and after all the men get on the chain on the side of it, they get on in the position to their bunk, then they lock the two ends together at this end with a padlock, and they stay that way all night.

Q. Let me ask you this question: Am I correct in understanding that there runs down between the rows of bunks a chain, and that when the men come in from work they are attached to that chain in the order in which their bunks are laid out?

(Testimony of Horace B. Conkle.)

A. That's right. [77]

Q. When that chain is locked they remain in both the shackle chain and the upright chain and this additional chain between the bunks while they are in there asleep, is that right?

A. That is right, that is what the upright chain is for. Like I said, you take it loose from your belt, it has a big ring on the end of it, and they run the building chain through that ring like that, and then you work your chain down to your bunk, and that is where you are. If you have to get up and be excused during the night, then you have to wake the other boys up in order for them to go down the chain with you, because you can't pass them.

Q. If you wanted to get up during the night to go to the toilet you would have to wake up everybody else in the row in order to get down the chain?

A. Between you and the toilet.

Q. Did they ever use, in your experience, the ball and chain in this prison? A. Excuse me?

Q. In this Colquitt County prison did they use the ball and chain?

A. Yes, I have seen ball and chains used in several different ways down there. I have seen them with it around their neck, a chain shack around their neck and a ball at the end of a chain. I have also seen them use it with a ball [78] at the end of the chain and a shack to their ankle.

Q. When you say "seen them," are you referring to white prisoners or Negro prisoners?

(Testimony of Horace B. Conkle.)

A. Well, I can't say there was no discrimination, but there was very little discrimination. If a white person was—if the guards felt he was going to run or they was making it so tough for him that he was going to do something out of the ordinary, they would throw it on him just as quick as they would the colored boy.

Q. This house chain that you refer to, the one that you are on when you come into your bunk, was that used for the Negro prisoners at your barracks also? A. Sure.

Mr. McTernan: I understand your Honor is not interested in the food aspect of it. I just would like to go into one small part of it.

The Court: It won't hurt any.

Q. (By Mr. McTernan): Are you familiar with the food given to the men at this prison when you were there? A. Yes.

Q. Did you ever see prisoners become sick after eating this food?

A. That was a common occurrence.

Q. What was the nature of their illness as far as you could observe it? [79]

A. As far as I could observe it and as far as I experienced it, you became nauseated at your stomach. A lot of times it developed into dysentery. Especially in the summertime in the hottest part of summer, the fellows would eat at noontime and then along in the middle of the afternoon, after they had worked from after they ate on, they would start

(Testimony of Horace B. Conkle.)

falling out from vomiting, and sour stomach, I guess you would call it.

Q. Were you and your fellow prisoners at this Colquitt County barracks working on the roads?

A. Yes.

Q. And will you describe generally the nature of that work?

A. Well, working on State highways and secondary roads and farm-to-market roads. The State highways, we were usually paving them or top-soiling them, getting ready to be paved; and on the secondary roads and farm-to-market roads, which were the County's sole obligation as far as roads were concerned, we filled in and built up shoulders and so forth.

Q. What tools, if any, did you work with?

A. We used picks, shovels, axes, sledge hammers.

Q. What was the approximate weight of the sledge hammer you used?

A. From 9 to 12 pounds.

Q. What did you use them for? [80]

A. For breaking rock, used them for driving stakes when we was putting in culverts.

Q. Did you do this work winter and summer?

A. Winter and summer.

Q. What were your hours?

A. We worked, in chain-gang parlance, from can't to can't. We couldn't see when we went to work and we couldn't see when we quit.

Q. From daybreak to nightfall?

(Testimony of Horace B. Conkle.)

A. That's right.

Q. Were you chained in the fashion you described while you worked, also?

A. Yes, except we wasn't on a building chain, or anything.

Q. Were prisoners in your prison required to wear picts? A. Yes, some of them.

Q. Did you hear Mr. Middlebrooks testify concerning the nature of a pict and how it is put on, this morning? A. Yes.

Q. Does that accord substantially with your recollection as to how it is done?

A. That's right.

Q. Have you seen men punished in this prison where you were confined? [81] A. Oh, yes.

Q. Will you describe the infractions, whatever the causes for the punishment were, for what reasons were they punished?

A. On a lot of occasions there didn't have to be any reason; it would just be personal malice between the guard and the prisoner, but——

Q. Mr. Conkle, that is a conclusion on your part. If you can describe what happened, it would be more helpful to the court.

A. Well, the punishments were always attributed to——

The Court: What were the punishments?

A. (Continuing): ——not doing enough work or not doing it right, or not doing it fast enough.

In this particular gang they used the strap, used the water cure, and used the sweat box.

(Testimony of Horace B. Conkle.)

Q. (By Mr. McTernan): You say the causes for this punishment were not doing enough work or not doing it well enough, or not doing it fast enough. Is that what the guards said to the prisoners at the time the punishment was inflicted?

A. That is right.

Q. When you say they used the strap, what do you mean? Describe it, please.

A. They have straps about three inches wide and about [82] three feet long on a handle cut in approximately the shape of a razor strap handle. I have seen this, this is not hearsay, I have seen them on the road, have a couple of trusties grab a man and throw him across a log, and then have the biggest other trusty that they had—well, he didn't necessarily have to be a trusty, he would just be a prisoner—have him whip the man.

Q. With the straps?

A. With those straps. And I have seen men when the seat of their pants would be completely filled with blood from those beatings.

Q. These men that you saw beaten with straps, were they beaten through their clothing or was their clothing taken off?

A. Through their clothing on the road.

Q. Is it done differently back in the barracks?

A. Yes. They always made them drop their trousers when they whipped them in camp.

Q. Were the guards equipped with these straps?

A. Yes.

(Testimony of Horace B. Conkle.)

Q. Did they use them in the fashion that you describe?

A. No, they didn't use them, they always had a prisoner use them. They were too lazy to use them.

Q. You referred to punishment known as the water cure, what you describe as the water cure. Will you describe that [83] to the court?

A. When they gave you the water cure, they handcuffed you, put your hands down over your knees in this fashion (indicating).

Q. In front of your knees?

A. In front of your knees that way, and then ran an iron pipe underneath your kneecaps.

Q. Underneath your knees and over your forearm?

A. Like this (indicating), and then they would run a pipe through there (indicating).

The Court: The witness is demonstrating a position with his knees pulled to his chest, his heels pulled in toward his buttocks, and his hands clasped over his shin bones.

Mr. McTernan: And indicating a pipe that was passed over his elbows and under his knees. Is that correct?

The Witness: That is right.

Q. (By Mr. McTernan): After the prisoner was in that position, what was done?

A. They had the trusties—he had all his clothes off, of course, and they had the trusties hold him underneath the shower spigot with his head directly

(Testimony of Horace B. Conkle.)

under it, and turned the water on full force. You couldn't move to right or left, and you just stayed there and swallowed water until, what we said, drowned, we became unconscious. [84]

Q. Then what was done?

A. They would roll you out from under it and when you came to they would roll you back under it if you didn't do what—if you didn't say what they wanted you to say.

Q. Have you seen men taken out from under that and put back again more than once?

A. I have had it done to me. I haven't seen it.

Q. How many times were you rolled out and back again? A. Seven times.

Q. You referred to the sweat box. Did you hear Mr. Middlebrooks testify concerning the sweat box at Walton prison? A. Yes.

Q. This morning? A. Yes.

Q. Is your testimony concerning the nature of the sweat box substantially the same as his?

A. It is substantially the same. The only thing is we didn't have sections in the sweat box at our camp. We just had a 4 by 6 box without any toilet facilities whatever, and they might put you in there with your clothes on or they might put you in there with them off, but they didn't give you any blankets or anything.

Q. Were you ever in the sweat box?

A. Yes. [85]

(Testimony of Horace B. Conkle.)

Q. What do the prisoners do for elimination purposes without toilet facilities?

A. Right on the floor.

Q. For what periods of times were you kept in the sweat box? A. I was in once for 48 hours.

Q. Was that the longest you were in?

A. Yes.

Q. Do you know of other cases that were longer?

A. I didn't know of anybody staying in there over 72 hours.

The Court: No windows of any kind, no ventilation of any kind?

The Witness: No, sir, your Honor, that is just what I was going to say. That is the reason, it was self-preservation, the reason they didn't keep them in there any longer than 72 hours, because a man would have died in there. In fact, I saw them pull one man out of the sweat box dead.

Q. (By Mr. McTernan): How high was this sweat box that you knew there at the Colquitt prison?

A. The one we had, the average-sized man, a man like me, had to stoop to get in it.

Q. How tall are you?

A. I am five, eight and a half. I couldn't stand upright in it. [86]

Q. Have you seen men at the Conquitt prison—did you see men—beaten with any instruments other than straps?

(Testimony of Horace B. Conkle.)

A. The walking bosses all carried hickory sticks.

Q. What is a walking boss?

A. He is the man that is in charge of production, you might say, he is the one that knows the nature of road repairing and any other repairing you might be doing.

Q. Is he connected with the prison?

A. Yes, he works for the County just like all the rest of them do.

Q. Will you describe the hickory sticks that these men are armed with?

A. They are about four or five feet long, they are about as thick as a man's arm, and they usually cut them right close to the tree where there is a knot at the end of it, about the size of a man's fist, and they season those sticks to use them for what they use them for.

Q. What do they use them for?

A. They use them to whip a prisoner down.

Q. What portion of the body do they hit a man on?

A. They didn't care where they hit him, just hit him is all.

Q. Have you seen them use it in this way?

A. Yes.

Q. Anywhere on the body where they can strike? [87] A. Yes.

Q. Do you know of a number of such instances—can you recall any of those instances that you have seen?

(Testimony of Horace B. Conkle.)

A. It was more or less a common occurrence to see them hit a man once or twice with it. That happened in the course of practically every day. It wasn't too common to see them when they would beat them down to the ground, though. I have seen that maybe on three different occasions.

Q. Did you ever see prisoners beaten with anything besides straps and these hickory clubs that you have described, that you can recall?

A. Not that I recall.

Q. Do you recall a man being beaten with a chain?

A. I saw them take an upright chain and whip a man one time with it.

Q. Who did that?

A. That was the shotgun boss.

Q. What is the shotgun boss?

A. He is the man that carries the gun.

Q. Is he with the road gang when it is out on the road?

A. Yes, he is responsible for keeping you there.

Q. How many shotgun bosses are there per road gang?

A. It all depends on how big a gang.

Q. What is the ratio of shotgun men to prisoners? [88]

A. Three men to every twenty-five.

Q. You say you saw one man beaten with a chain? A. Yes.

Q. Was that out on the road? A. Yes.

(Testimony of Horace B. Conkle.)

Q. What happened to that man during that beating, do you know?

A. They just beat him to the ground. We don't know, I don't know for sure, but they took him away from there and said they took him back to the State Farm. We later heard that the man died.

Q. In any event, all you know is after he was beaten he was taken away? A. Yes.

The Court: The rest of it is hearsay.

Q. (By Mr. McTernan): Were the guards over these chain gangs equipped with guns?

A. Yes.

Q. Did you ever see a guard force a man to do anything at gun point?

A. Oh, yes. I have seen them force them to fight each other at gun point. I have seen them—well, like for instance the time I was drowned, why, the guards forced the trusties to hold me under the water at gun point.

Q. Did you ever see guards force a prisoner to unload [89] a harrow from the back of a truck at gun point?

A. Oh, yes, I saw—we had this truck backed up to the shoulder of the road, we were sodding this road, sodding the shoulders, planting grass on it to keep it from washing, and there was a disc harrow in two sections, it was loaded in the back of a dump truck, and we unloaded one section, and James King —I know James King and this boss didn't get along together very well.

(Testimony of Horace B. Conkle.)

Q. Who was James King?

A. He was a colored convict. So the boss said James wasn't doing his share of the work when we unloaded the first half of the harrow. He says, "Now, you get around there, you big black son-of-a-bitch and grab that harrow and pull it off of that truck." And James looked at him and said, "Boss, that thing will kill me." "You heard what I said." So we had this truck backed up to this bank so it wouldn't fall too far to break the harrow when it hit the ground. He made the rest of us get on the sides of the harrow and pull it. James couldn't pull it by himself, and he was right in the center, this big disc harrow, and when we jerked it off, the harrow landed right on top of him. He went backwards on the shoulder of the road like that (indicating), and I guess he caught his heel or something, and that harrow landed right on top of him, and it crushed him and cut him all to pieces. There was no hearsay to [90] that. He died right then. He was dead when they hauled him off.

Q. You were present this morning, were you, Mr. Conkle, when Mr. Middlebrooks testified concerning the stock? A. Yes.

Q. Did they have a stock at the prison that you were confined in? A. Yes.

Q. Would your testimony concerning the nature of the stock and manner of its use be substantially the same as Mr. Middlebrooks?

A. About the same thing.

(Testimony of Horace B. Conkle.)

Q. Mr. Middlebrooks testified that they kept men in the stocks at Walton approximately an hour. Can you recall the period of time that either you yourself or other people have been confined in stocks at Colquitt?

A. I have seen men put in stocks and kept there four and five hours, kept there hours after they became unconscious in the stocks.

Q. Were they placed in the stocks substantially the same way, with their knees wired down the way Mr. Middlebrooks stated this morning?

A. Yes. We had a head notch in our stocks, instead of using a 2 by 4 the warden recommended a quarter section of a piece of cord wood, it came up like that to a point, [91] and you sat on that point.

Q. Instead of sitting on the 2-inch side of a 2 by 4 you sat on the pointed side of this rough-hewn cord wood, is that right? A. That's right.

Mr. McTernan: You may cross-examine.

Mr. Thomas: The respondent at this time will move the court to strike the testimony of the witness on the following grounds: that the testimony is incompetent, irrelevant and immaterial to any valid issue before the court; secondly, on the ground that the petition in this case and counsel's opening statement does not state facts sufficient to constitute a cause of action; and, thirdly, the testimony bears upon issues which are beyond the scope of the jurisdiction of this court.

(Testimony of Horace B. Conkle.)

The Court: The motion will be taken under submission along with the others.

Mr. Thomas: No cross-examination.

The Court: Did you serve your time or escape?

The Witness: I served my time, your Honor.

The Court: How long?

The Witness: Four years and eight months.

The Court: When were you released?

The Witness: July of 1939.

The Court: When did you come to California? [92]

The Witness: I came to California August of '48.

The Court: Where did you live between '39 and August of '48?

The Witness: I was in the Service almost five years during the war. Then I lived in Georgia from '39 when I came out until I went in the Service. When I came out of the Service I lived in New York with my mother until I came out here.

The Court: What business are you engaged in?

The Witness: I am a decorator.

The Court: You live in Santa Barbara?

The Witness: Yes.

The Court: You are self-employed?

The Witness: No, sir. I work for a company.

The Court: Thank you very much.

Mr. McTernan: Your Honor, I overlooked a couple of things.

(Testimony of Horace B. Conkle.)

Q. (By Mr. McTernan): Mr. Conkle, were you back in Georgia in '45 and '46?

A. Yes.

Q. Did you see chain gangs at work at that time?

A. Yes.

Mr. Thomas: May my objection previously made go to these additional questions?

The Court: The same objection heretofore made may go [93] to this entire testimony.

Q. (By Mr. McTernan): Were these chain gangs that you saw in 1945 and 1946 engaged in substantially the same kind of work that you were engaged in when you worked in the chain gang?

A. Yes, sir.

Q. And were their hours of work approximately the same?

A. In most of the counties. There are two counties in Georgia that I know has got eight hours now.

Q. Do you know whether that applies to the Walton?

A. No, sir. Bibb County and Muscogee is the only two that got the eight-hour law.

The Court: You mean the prisoners cannot be compelled to work more than eight hours in one day?

The Witness: That's right.

Q. (By Mr. McTernan): But as far as you know that did not apply to Walton or Colquitt; is that right?

A. That is right. There is only two of them that has, Bibb and Muscogee.

(Testimony of Horace B. Conkle.)

The Court: Did you see any quarters?

The Witness: Yes.

The Court: The same kind of quarters?

The Witness: Yes, sir.

The Court: Did you observe any brutality on this trip [94] in '45 and '46?

The Witness: No, sir; I couldn't very well.

The Court: Did you see the guards?

The Witness: Yes, sir.

The Court: Still armed with shotguns?

The Witness: Still the same, shotguns, rifles and pistols.

The Court: The men still in ankle shacks?

The Witness: Men still in shacks, still in stripes. Some of them were dressed in browns. I don't know whether they were supposed to be trusties or not.

Q. (By Mr. McTernan): What about hickory sticks, did you see those in 1945 and '46?

A. They were in evidence, yes.

Q. Straps?

A. I didn't see any straps.

Q. Did you see the food that they were given when you were back there in '45 and '46?

A. No.

Mr. McTernan: That is all.

Mr. Thomas: We will renew our motion to strike the witness' testimony to the last few questions, your Honor, on the same grounds as heretofore set forth.

The Court: The motion will be taken under submission.

Does that conclude the material from this witness? [95]

Mr. McTernan: Yes, your Honor.

The Court: You may step down.

Mr. McTernan: Your Honor, Mr. Conkle is here under subpoena. I take it he may be excused?

The Court: You may be excused, Mr. Conkle.

Mr. McTernan: If the court please, I offer as Petitioner's Exhibit next in order a document consisting of three sheets. First a certificate from the State Board of Corrections concerning Harold G. Gibbs and his conviction and sentence in the jails of Georgia, and two pages consisting of an affidavit concerning the living conditions in the prison where he was confined.

Mr. Thomas: To which the respondent sheriff objects on the ground that the exhibits are immaterial, incompetent and irrelevant to any issue validly before the court. Secondly, on the ground that the petition for a writ does not state facts sufficient to constitute a cause of action. And, thirdly, the relief prayed for in the writ is beyond the scope of the jurisdiction of this court.

The Court: It is the same objection that you made heretofore?

Mr. Thomas: Yes.

The Court: Who is Gibbs?

Mr. McTernan: He is identified in the certificate, your Honor, as a former convict and prisoner of the State of Georgia. [96]

Mr. Thomas: Also on the additional ground that

we would like to object because we have no right by this affidavit procedure to cross-examine the witness.

The Court: Of course, there is no foundation laid. If there is an objection either to the foundation or the use of the affidavit, the objection will have to be sustained.

Mr. McTernan: I want to call your attention to Section 246 of Title 28 of the U. S. Code, which does permit the receipt of affidavits in proceedings of this kind. And I thought the certificate of the State of Georgia would establish sufficient foundation, to wit, that Gibbs was a man who was sentenced to serve in the Georgia prison and did so serve.

The Court: That is true. I didn't think about that. There is a provision allowing for use of affidavits, but providing something in addition, that the other side may—what is it, take depositions? What does the section say?

Mr. McTernan: The section says upon application for a writ of habeas corpus evidence may be taken orally or by deposition, or in the discretion of the court by affidavit. If affidavits are admitted any parties shall have the right to propound written interrogatories to the affiants or to file answering affidavits.

The Court: Of course this is a photostat of an affidavit. Do you make objection to it because it is a photostat? [97]

Mr. Thomas: Yes, we will object on that ground also, if the original document is not here.

The Court: It is not even an affidavit, counsel; it is a photostat of something which appears to be an affidavit.

Mr. McTernan: It is the best I can offer.

The Court: The objection will be sustained.

Mr. McTernan: May the document be marked and kept in the rejected exhibit file?

The Court: Mark it for identification, Mr. Clerk.

The Clerk: Petitioner's Exhibit 8 for identification.

(The document was marked Petitioner's Exhibit No. 8, for identification.)

PETITIONER'S EXHIBIT No. 8

State Board of Corrections
Atlanta, Georgia

Certification—

I Hereby Certify that Harold G. Gibbs Reg. No. FM-10608 now serving in Fulton and who was convicted of the offense of (5) Misd. (2) Fict. Cks. at the Nov. term 1948 Superior Court of Fulton County, Georgia, and was sentenced by the Presiding Judge to serve a full term of (5) 6 mo. concur., 6 mo. consec. 6 mos. concur. service of which was begun on the 16th day of Nov. 1948, will have served

said sentence (with) extra "good time allowance" on the 24th day of August 1949 and is entitled to be discharged from service on that date.

/s/ ROBERT N. CARTER,
State Board of Corrections,
Chief Clerk.

Discharge Order

To the Warden of Fulton County PWC:

The above named prisoner being entitled to discharge on the date specified above, you are hereby directed to discharge and set at liberty the said named prisoner on that date.

You will report on regular description form the discharge of the prisoner on the day of release.

This the 20th day of July 1949.

/s/ R. E. WARREN,
Director State Board of
Corrections.

Harold George Gibbs, Jr., being duly sworn deposes and says:

That he makes this affidavit in order to testify to the conditions which existed in Fulton County Public Works Camp, Alpharetta, Georgia, between November 16, 1948, until August 24, 1949.

The conditions which existed in this particular camp at the aforesaid times are of such a horrible

nature that deponent believes that the aforesaid conditions should be exposed before the eyes of the people of the United States.

That the deponent, having entered said camp as an inmate thereof on November 16, 1948, states that:

The first thing is the food. In the morning they feed you grits and gravy. The gravy was burned; the biscuits were just dough; the coffee was nothing but water, with no milk or sugar in it, and when you are out on the road working, they feed you red beans with worms in them, not fit for anybody to eat; the bread was put into a box. This was brought on the road to the road gang, maybe 9:30 in the morning, set on the ground and by the time we got it at dinner time the box was full of ants. When we came in at supper time, after working all day out on the road, we were fed the same thing we had for breakfast, things that were left over from breakfast.

We slept on straw mattresses, with no sheets or pillow cases. The whole time I was there these mattresses were never changed. They had punishment which they called a box. I saw fellows put in there for drinking too much water on the road while working. They were left in there 8 or 10 days, fed one biscuit in the morning with water, one biscuit at supper with water. Every five days they were given a meal, so-called, consisting of maybe a plate of beans and a piece of cornbread. There were no beds in these boxes, no toilet but were given a bucket to use, no place to wash. When you were

put in there they made you take all your clothes off, winter or summer, and slept there with one blanket, on the floor. I have seen the warden make fellows get out and fight in the yard over an argument which they might have had between themselves, and when they were tired and exhausted he would make them keep on fighting by slapping them over the face or hitting them over the head with a slapjack. Our walking boss or shot-gun man, when you were tired and would quit working, would come over and hit us over the head with a club, which was called a "walking stick."

They rode you to work in an open dump truck in the winter-time, maybe 10 or 15 miles, according to where we were going to work on the road. I have seen fellows shot in the back when they tried to escape; I have seen them beaten, when caught, and when they were brought back to camp, they were put into stripes and thrown into the box for three weeks on just bread and water. When they were left out of the box they were made to wear those stripes for 90 days.

I know of one particular case of a man by the name of Forrest Turner who was beaten for refusing to work and as a result of this beating received a permanent injury to his hip and to this day still walks with a limp although he was beaten about 9 months ago.

Conditions in these camps are such that it isn't even fit for a dog to live in, let alone a human being.

As I am a white fellow and have seen with my

own eyes the Negro race treated worse that what I have said and what I have been through.

I live at 2817 C Street, Chester, Pennsylvania, which is my permanent address.

/s/ HAROLD G. GIBBS, JR.

Sworn to this 19 day of Oct., 1949.

[Seal] /s/ EUGENE ELINEK,
Notary Public, State of New York.

Admitted Dec. 20, 1948.

Mr. McTernan: Your Honor, we at this time ask the court to take judicial notice of the report of the President's Committee on Civil Rights entitled To Secure These Rights, and in particular a portion thereof which is not very long, which I would like to read, so that this document which I have obtained from the public library will not be marked and become a part of this record.

Mr. Thomas: To which the respondent objects on the ground that the proffered testimony is incompetent, irrelevant and immaterial.

The Court: Is this an unofficial committee or was it an official committee of the government? [98]

Mr. McTernan: It is my understanding that this is an official committee appointed by the President of the United States, which reported to him. This

is its report. The report was not only filed with the President, but also with Congress, and certain recommendations for legislation were prepared on the basis of this report.

The Court: How long is the extract?

Mr. McTernan: The part I have marked here is longer than I thought. If you give me a minute I think it can be boiled down into two short paragraphs.

The Court: Let me say this: On the representation that this is an official committee appointed by the President, that the report was made to the President and submitted to a Congressional Committee, I will overrule the objection and permit it in evidence. However, it seems to me if you have any more documentary evidence of that sort we can save a lot of time.

Mr. McTernan: This is all I have.

The Court: The meat of this coconut is whether the court has jurisdiction and whether you have a cause of action. That is the interesting part of this case. I want you to get into that.

Mr. McTernan: I want to get into that.

The Court: We will take a five-minute recess at this time and maybe by that time you will have it boiled down. [99]

(A recess was taken.)

Mr. McTernan: Shall I read now these portions?

The Court: Yes.

Mr. McTernan: The copy I happen to be read-

ing from is a reprint of the report as appeared in the San Francisco News.

The Court: Was the report printed in the Federal Register, do you know?

Mr. McTernan: I don't know, frankly, your Honor. There were up until a few days ago in my office some of the official volumes that were pulled out of it, and when I came to get it for the purposes of this case I couldn't get it, and I had to go to the library to get this.

The Court: All right.

Mr. McTernan: The portion that we call to your Honor's attention reads as follows:

"Toward the end of the work of this committee a particularly shocking instance of this occurred. On July 11, 1947, eight Negro prisoners in the State Highway Prison Camp in Glynn County, Georgia, were killed by their white guards as they allegedly attempted to escape. The Glynn County grand jury exonerated the warden of the camp and four guards of all charges. At later hearings on the highway prison camp system held [100] by the State Board of Corrections conflicting evidence was presented. But one witness testified that there was no evidence that the prisoners were trying to escape. In any case, he said it was not necessary to use guns on them in the circumstances. 'There was no justification for the killing. I saw the Negroes where they fell. Two were killed where they crawled under the bunkhouse and two others as they ran under their

cells. The only thing they were trying to escape was death. Only one tried to get over the fence.' The warden and four guards were indicted by a Federal Grand Jury on October 1, 1947, and acquitted by a jury November 4th.

"It is difficult to accept at face value police claims of this type that action has been taken against prisoners in 'self-defense' or to 'prevent escape.' Even if these protestations are accepted, the incidence of shooting in the ordinary course of law enforcement in some sections of the country is a serious reflection on these police forces. Other officers in other places seem able to enforce the law and to guard prisoners without resort to violent means. The [101] total picture—adding the connivance of some police officials in lynchings to their record of brutality against Negroes in other situations—is, in the opinion of this committee, a serious reflection on American justice. We know that Americans everywhere deplore this violence. We recognize further that there are many law-enforcement officers in the South and North who do not commit violent acts against Negroes or other friendless culprits. We are convinced, however, that the incidence of police brutality against Negroes is disturbingly high. In addition to the treatment experienced by the weak and friendless person at the hands of police officers he sometime finds that the judicial process itself does not give him full and equal justice. This may appear in unfair and perfunctory trials, or in fines and prison sentences

that are heavier than those imposed on other members of the community guilty of the same offenses. In part, the inability of Negro, Mexican or Indian to obtain equal justice may be attributed to extra-judicial factors. The low income of a member of any one of these minorities may prevent him from securing [102] competent counsel to defend his rights. It may prevent him from posting bail or bond to secure his release from jail during trial. It may be predetermining his choice, upon conviction, of paying a fine or going to jail. But these facts should not obscure or condone the extent to which the judicial system itself is responsible for the less than equal justice meted out to members of certain minority groups."

Mr. Thomas: At this time respondent moves to strike the excerpts read on the ground that the testimony is incompetent, irrelevant and immaterial.

The Court: And upon all the other grounds you have previously stated?

Mr. Thomas: That's right.

The Court: I will reserve ruling on that motion, too.

Mr. McTernan: We rest, your Honor.

Mr. Thomas: We rest, your Honor.

The Court: For the purpose of assisting you in your argument, as far as the factual issues are concerned, I will define briefly the facts which are not very much in dispute.

We find that this petitioner was born on the date stated by him.

Mr. McTernan: February 11, 1917.

The Court: Yes. And that at about the age of fourteen [103] he was arrested for five acts of burglary and was handled by the juvenile authorities and sent to a school. That subsequently he was indicted by the grand jury of this county in Georgia. Apparently it was an indictment based on the same acts as the juvenile offense. I don't know anything about the law of Georgia. It may have been proper to have prosecuted by indictment an individual after it became impossible to handle him in a juvenile manner. Juvenile proceedings in this State are not prosecutions. California law is clear on that. And the court will assume, in the absence of law to the contrary, that Georgia law is similar. I find, also, which are really facts on which this case will hinge, that at the time of his purported arraignment he did not have counsel. There is a conflict between the documents and the testimony of the witness that he was even arraigned. The document says he was arraigned. He denies it. I find that there was an arraignment as set forth in the document, but that he did not have counsel to represent him, and that he was of whatever age it figures out at that time, I take it that is seventeen. That he was sentenced to a year each on five counts to run consecutively; that he escaped from the camp, was returned, served some more time and escaped again. I am going to find, also, that the type of punishment and housing, treatment of prisoners in the State of Georgia, con-

stituted cruel and [104] unusual punishment as the term is referred to in the Constitution.

On the basis of those findings, it seems to me that there are two questions presented, among others. Assuming that there was cruel and unusual punishment, is that any basis for the granting of a writ of habeas corpus here in the Federal Court? That is a legal problem. Beyond the factual stage now, we get down to what the cases say.

Secondly, assuming he did not have counsel at his arraignment and sentence, is there a legal basis for granting a writ of habeas corpus here in the Federal Court?

I have read a little law on that, and it is a very interesting problem. There are several other questions that I want to suggest to you in your argument. Johnson v. Dye was reversed by the Supreme Court by merely a citation of the Hawk case. The Hawk case was a case growing out of a state prosecution where a man had been prosecuted in one of the States of the Union for a crime of murder. Various appeals in an attempt to review the matter were taken. Finally when the matter got to the Supreme Court the Supreme Court held in the Hawk case that he had not exhausted his State remedies. We therefore take it to be the rule that before you come into the Federal Court you must exhaust your State remedies. That is, I think, the law, and I think both sides concede that. So one of the questions [105] presented here is when you say you must exhaust State remedies, does that

mean you must exhaust State remedies of, in this case, both California and Georgia? Obviously, if the rule is broad enough to require that you have to exhaust State remedies in Georgia, then you haven't complied with the rule, because there has been no showing of any kind that any attempt was made to exhaust Georgia remedies. There is a question presented there.

By the way, I haven't read the return of the sheriff carefully, but I suppose there is no dispute that counsel for the petitioner and the petitioner have taken the various steps in the State Court and in the Supreme Court of the United States, as he alleges in his petition, is there?

Mr. Thomas: Your Honor, we are willing to stipulate, I found out yesterday by checking, that the sheriff was officially notified that they did seek a writ or stay, rather, from the Supreme Court of California, and that a writ was denied there, a stay was denied, by the Supreme Court of California to allow certiorari to be filed. Other than that I don't know.

The Court: I take it that the court would be required to almost take judicial notice of the proceedings in the Supreme Court, would it not?

Mr. Thomas: I will take counsel's statement.

Mr. McTernan: I can supply you with the documents if [106] you care to look at them.

The Court: Counsel so states, don't you, that you took the proceedings as you have alleged in your petition?

Mr. McTernan: Yes; and I covered in my opening statement, too, that we asked for a stay from the Supreme Court of California—first we asked for habeas corpus from the Superior Court, the District Court of Appeals, and the Supreme Court of California, we asked for a stay pending application for certiorari from the Supreme Court of California——

The Court: Which was denied?

Mr. McTernan: Yes, which was denied. We asked for a stay from two justices of the United States Supreme Court.

The Court: Which was denied?

Mr. McTernan: Yes.

The Court: By Douglas without prejudice, and by Black without any notation whatsoever?

Mr. McTernan: Yes.

Mr. Thomas: You did not file a petition for certiorari in the Supreme Court of the United States?

Mr. McTernan: No, I did not.

The Court: So we have the question of when the Hawk case talks about exhausting the State remedies, do they mean both Georgia and California? Assuming for the purpose of argument, certainly in so far, we will say, as petitioner's [107] first point is concerned, that California was without jurisdiction to act and that they are complaining of California's action, and assuming, therefore, from that standpoint they wouldn't have to exhaust Georgia's remedies, the next question is have they

exhausted all the remedies within the State? Does the fact that they didn't petition for certiorari but petitioned for a stay so they might seek certiorari, or any other thing appearing in there, indicate that they didn't exhaust remedies in California?

Another question that comes to my mind, is the California decision res judicata?

I may be wrong on this, but there is no showing here on what grounds relief was sought in the State Courts. Or do you allege that in your petition?

Mr. McTernan: I am not very clear in my mind on that just now, your Honor.

Mr. Thomas: They allege they filed a petition, but they don't say on what ground.

The Court: Can we stipulate, so we will have a clear record in this case, that the relief sought in the State Courts of California was upon the same grounds as sought here, can we so stipulate?

Mr. Ternan: I will so stipulate, because it is a fact. If counsel feels he cannot stipulate, I would like to put a witness on. [108]

The Court: That is the most favorable position for the sheriff here.

Mr. Thomas: Just one moment, your Honor, if I may, to straighten out one point.

Your Honor, I cannot stipulate to that for the reason that I was not present at any of the hearings in either the District Court of Appeals or in the Supreme Court. I don't know what they filed.

The Court: Can you take counsel's word for it? As I see it, that is probably the strongest posi-

tion that respondent would have here, particularly in view of the fact that it may possibly be a question of res judicata, assuming that the same issues were raised in the State Courts and went clear through the State Courts and the Supreme Court of the United States finally denied a stay. If there were different issues raised in the State Court, then that point would not be available to you.

Mr. Thomas: I think there are one or two issues raised here that were not raised in the lower court.

The Court: Then maybe that point is not involved.

The only way that point would arise is in the event the same questions were raised. I am not saying there is even a point there, but I am thinking out loud. If the same points were raised in the State Courts, it conceivably could be argued that it might be res judicata and therefore there [109] could be nothing that this court could decide. But in the absence of any stipulation as to what went on in the State Courts, I think our record is deficient, counsel, in any showing as to what you did in the State Courts.

Mr. McTernan: I would be glad to supply that deficiency, your Honor.

The Court: I would like to have it supplied. If I am going to decide this case, I would like to have a complete record. The record shows now that you sought a writ of habeas corpus in the Superior Court, District Court of Appeals, and the Supreme Court. There is no showing of what ground, and

therefore on the question of exhaustion of remedies, itself, it seems to me the record should show some manner of the relief you sought. Do you have copies of the petition you sought?

Mr. McTernan: I think I have copies of everything. I was going to have Mr. Simmons testify to it.

The Court: Was the petition identical in the three courts?

Mr. McTernan: Mr. Simmons advises me that the petition was identical with the exception of the necessary introductory language, and with the exception that as we went to each successive higher step we had to add what went on before.

Mr. Simmons: In the trial court in the Superior Court [110] in Santa Barbara we used less language than we did in the District Court and in the Supreme Court of California. We went into great detail and pleaded all the facts which were testified to here today, we did it much simpler in the Superior Court, but the same points were there, your Honor.

The Court: Let's make this order: I do not think I am going to be able to decide this from the bench here unless you gentlemen are very persuasive, because I am very frankly on the fence about it. Let's provide an order that the attorney for the petitioner may subsequently file as an exhibit in this case a copy of his petition for a writ in each of the State Courts. In fact, I would suggest that you prepare a document as an exhibit

in this case constituting all of your proceedings in the State Courts. Don't you think that would make a better record?

Mr. McTernan: I think so, your Honor. Suppose I prepare copies of the petitions to each court for habeas corpus with whatever supporting evidence there may have been, together with the application for stay to the Supreme Court of California with the supporting affidavit, and the application for stay to the justices of the Supreme Court of the United States with the supporting affidavit.

The Court: That will be satisfactory, and I think in the case of the Superior Court—that is the only court in which a return was made, was it not? [111]

Mr. McTernan: I believe that is correct.

The Court: Was the return substantially the return that was made here?

Mr. Thomas: Substantially. I think our last return is much more in detail.

The Court: Can't we use this return as the return——

Mr. Thomas: We will provide a copy of the return, if the court desires, to be submitted as the return actually filed in that case.

The Court: In the Superior Court, fine.

Mr. Thomas: I shall offer that now, if I may, your Honor, and that will clear up that point. We will submit at this time a copy, a certified copy of the return filed by John D. Ross, with the attached exhibit, being a photostatic copy of the Governor's warrant, the return being filed in case No. 43360, In

re Application of Sylvester Middlebrooks, Jr., for a writ of habeas corpus in the Superior Court of the State of California in and for the County of Santa Barbara. I will offer that.

The Court: It will be admitted into evidence. Counsel for the petitioner may file a copy of the various proceedings that he took in the courts of the State of California and before the justices of the Supreme Court, to complete the record.

Mr. McTernan: Thank you, your Honor. Do you want our [112] documents certified, because it will take a little time to get the certified documents from Washington.

The Court: Do you think we can waive the certification?

Mr. McTernan: I think I will be able to supply carbon copies of the documents actually filed.

The Court: Is that satisfactory?

Mr. Thomas: That is satisfactory.

The Clerk: I have marked this Respondent's Exhibit as Respondent's Exhibit A in evidence; and the documents which Mr. McTernan is going to file, shall we mark those?

The Court: Assign one number to the entire group.

The Clerk: Petitioner's Exhibit 9 will be the number assigned to the documents submitted by the petitioner.

(The documents referred to were marked Respondent's Exhibit A, and were received in evidence.)

("Petitioner's Exhibit No. 9" was the number reserved for the documents to be submitted by the petitioner.)

Mr. Thomas: Your Honor, may I make an inquiry at this time?

The Court: Yes.

Mr. Thomas: Does the court desire oral argument on this matter now?

The Court: Yes. [113]

Mr. Thomas: Or do you wish us to submit it on brief?

The Court: I would like some argument and probably will want some briefs on it.

In going over some of these points that come to my mind—I mentioned several of them already—another point that comes to mind is the fact that certainly the function of this court is not to review what the courts of the State of California did. In other words, one of the grounds set forth in the petition for the writ is that Middlebrooks' presence in the State of California is not due to his voluntary act, but due to compulsion in that the Army transported him to Camp Cooke.

That might be a good ground in the State Court.

Mr. McTernan: We are not pressing that.

The Court: I do not think this court has any function in reveiwing that, so I am not going to give any consideration to that particular point.

Which one of you wants to start off and argue

this matter a little bit? Mr. McTernan, supposing you begin.

Mr. McTernan: If the court please, I would like to say a few things concerning the findings which the court indicated orally. I am sure it was not intended to be a comprehensive statement of the findings which the court is prepared to make on this record, but I do feel that there are some additional facts which should be mentioned and that should be [114] before us for the purposes of this argument.

The Court: No, those were not complete findings. Two of them, I think, were significant to assist you in arguing the case. One, I found he was not represented by counsel, and another one is that it is my conclusion that the punishment is cruel and unusual.

I think those are the two essential facts.

Mr. McTernan: In view of certain of the authorities, your Honor, concerning the significance of deprivation of counsel in the State Court, I think that additional facts are of extreme importance. As the court has pointed out in a number of cases where the claim is deprivation of the right of counsel in a State Court, the plain fact of deprivation or lack of counsel in a non-capital case is not determinative of the issue as to whether or not there has been an infringement of a constitutional right, but depends upon all of the circumstances present at the time. I would like to point out in this connection that the undisputed record here is that Middlebrooks was arrested in June or July of 1934, and

held in jail without charge and was never given or shown or told about the charges against him until he was taken before the judge for purposes of what the jailer called a trial. That at this time Middlebrooks was seventeen years old; that he had not completed the third grade in the Georgia public schools; that he had little or no familiarity with legal [115] procedure, other than to know he did have a right to counsel and did have a right to a jury trial, both of which he asked for, and both of which were denied him. There is a conflict in the testimony as to whether or not he pled guilty. The Georgia record shows that he pled guilty. He testified that he did not plead guilty. In fact, that he said that he wanted a jury trial. There is a conflict in the evidence concerning the arraignment. Your Honor is inclined to hold that there was an arraignment, but I want to point out to your Honor that the testimony here is that he was at that time simply addressed by the court saying, "What do you mean going around breaking the laws of Georgia?" or something to that effect, and he denied he had broken the laws of Georgia.

The Court: The court's findings will not be findings until they are signed in writing. There is a dispute on that part. The other matters you state about which there is no dispute I would have no trouble in finding; that he was seventeen and he only went to the third grade, nobody saw him except his mother, and he was never handed a copy of the indictment. There is only the one matter on which there is dispute.

Mr. McTernan: Yes. I went into these matters that are in dispute because they form the basis for an additional contention on our part, and that is there was no [116] trial for a reason other than the fact that there was a deprivation of counsel. He was not told what the charges were, given an opportunity to plead, and given what he asked for namely, a trial on the issues of fact before a jury. So that the lack of due process stems both from the deprivation of counsel and from the proceedings that took place before that judge back on February 8, 1935.

Your Honor has posed certain problems, and I will try to develop my argument around them.

(Whereupon the case was argued to the court by counsel for the respective parties, which argument was reported by the court reporter but not requested by counsel to be transcribed.)

The Court: It is almost 4:30, and I want you gentlemen to brief this and as expeditiously as possible. I suppose there is a need for a speedy decision, solely because the County of Santa Barbara is supporting this petitioner, for which, however, they will be reimbursed by the State of Georgia. How much time would you need. Mr. McTernan, to get an opening brief in here?

Mr. McTernan: I think we can do it in a week, your Honor. If we can do it in less, we will. I do have other commitments which have to be met.

The Court: That puts you right over the Christmas holidays. It seems to me that the line of dis-

cussion has [117] been pretty well marked out here. It is a question of organizing the material and your arguments. This is the 20th, isn't it? How much time would you want to answer?

Mr. Thomas: They are only going to have a week, your Honor?

The Court: Yes.

Mr. Thomas: Ten days, your Honor, for a reply. We haven't any objection if they take ten days to file their opening brief.

Mr. McTernan: We were trying to cut the time down because so far Mr. Middlebrooks has remained in custody. We would like, your Honor, to raise, sometime along here, the question of releasing him on bail while this matter is under consideration. We are right up against the holidays now. In view of the fact that some time will be taken for submitting briefs——

The Court: My mind is not made up on this thing. It is wide open. It is an interesting problem. I would like to see a good brief on it. If I were convinced for certain that I was going along with petitioner's view, I would consider bail. But my mind is not made up, so under those circumstances, and having in mind the general rule of habeas corpus, that you don't disturb custody, I am not inclined to grant bail. Apparently Mr. Middlebrooks likes California, although he would rather be outside than in, and I think [118] he will be well treated in Santa Barbara. A little delay is not good, but he

has a lot at stake, and he can well be patient with his counsel to write a good brief.

Mr. McTernan: I would like to write a good brief, but I would like it better if I had a little more time if it was not at the expense of Mr. Middlebrooks.

The Court: I don't think Mr. Middlebrooks is going to be concerned about that.

You are being well treated, are you not, presently?

Petitioner Middlebrooks: Yes, sir, it is all right now.

Mr. McTernan: Well treated for a jail.

The Court: It is a good little county. I was born up there.

Mr. McTernan: But these holidays are coming.

The Court: How much time do you want? I am not going to grant bail. If you want ten days, I will give you ten days.

Mr. McTernan: May we leave it this way, that we have a maximum of ten days and we will get it in sooner if we can, and your time runs from the receipt of our brief?

Mr. Thomas: That is satisfactory.

The Court: All right. Petitioner's memorandum of points and authorities to be filed on or before December 30th, respondent's points and authorities to be filed ten [119] days thereafter.

The Clerk: Ten by ten would cover it.

The Court: Ten by ten, then.

Would you like to have time to reply?

Mr. McTernan: I would like to have time if I feel so advised.

The Court: I will give you five days to reply. Ten, ten, and five.

Mr. McTernan: Your Honor, Mr. Loren Miller was here this morning and could not come back after lunch because of a court engagement. He had come to file an appearance amicus curiae on behalf of the National Association for Advancement of Colored People. When he was unable to return he asked me if I would ask the court for permission to enter that appearance, and he may desire—I haven't discussed it with him—to file a brief amicus curiae.

The Court: Permission will be granted for his appearance as amicus curiae, and if he is so inclined, to file a brief. However, I would rather have one good brief in this case and not have to read half a dozen. You and Mr. Miller are good friends, and I suggest that he could well give you some help in preparing the matter. But it is all right, if he files it I will read it.

Mr. McTernan: Thank you.

The Court: In your memorandum I would like you to [120] direct your attention to the matters that I suggested heretofore and any other points that you think pertinent for a decision of this case. The matter then to stand submitted, is that satisfactory?

Mr. McTernan: To stand submitted upon the filing of the briefs?

The Court: Yes.

Mr. Thomas: Your Honor, in the event of a decision by your Honor with respect to going either

way in this case, Mr. Richards has asked me to inquire whether or not you would contemplate granting either side a stay of execution, whichever way it went, in order to perfect an appeal.

The Court: I would have to check a little further on the rules. The rules of the Circuit set out the provisions for bail in habeas corpus cases, and they, in substance, provide that custody is not disturbed. This is a matter of law. You can look up the law and the rules on it. I am just telling you from memory what I remember about it. So, for instance, if this court discharged this writ, remanded this man to custody, and the appellant took an appeal, under the rules of the Circuit custody would not be disturbed. They might take their appeal, and probably would be entitled to some surety or some arrangement for the return of the man to respond to any order of the court on appeal. I think it is Rule 29. On the other hand, if the [121] court granted the writ and discharged him from custody, and the respondent appealed, again the rule is you don't disturb the situation that has been created, but he could be required to put up bail to respond to the order in the event it was reversed.

This is very rough in my mind, but generally speaking I think that is the situation.

Mr. Thomas: We asked the question, your Honor, by reason of the existence of Section 2251 of Title 28, which reads——

The Court: How does it read?

Mr. Thomas: "A justice or judge of the United

States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

"After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending."

I don't know whether that rule affects or changes some of the old rules. [122]

The Court: I will certainly give either side a chance to turn around.

Mr. Thomas: That is all we want.

The Court: That is what an attorney should want, just give him a chance to get his feet under him and decide what he wants to do next.

I don't know what the legal situation is myself.

Mr. Thomas: Thank you.

The Court: All right. [123]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and

correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of June, A.D. 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed June 9, 1950, U. S. C. A.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 113, inclusive, contain the original Petition for Writ; Order for Issuance of Writ of Habeas Corpus; Writ of Habeas Corpus; Return by John D. Ross, Sheriff of Santa Barbara County, California; Opinion; Order for Release of Petitioner; Disapprovals as to Form and Objections to Proposed Findings of Fact; Conclusions of Law and Judgment; Findings of Fact and Conclusions of Law; Judgment; Application for Allowance of an Appeal by Respondent, John D. Ross, Sheriff of Santa Barbara County, California, and for the Issuance of a Certificate of Probable Cause; Order

Allowing Appeal and Certificate of Probable Cause; Appointment of Attorneys; Notice of Appeal and Designation of Contents of Record on Appeal and full, true and correct copies of minute orders entered December 20, 1949, February 3, 1950, April 5, 1950 and April 27, 1950, which, together with Original Petitioner's Exhibits 1 to 9, inclusive, and Original Respondent's Exhibit A, and Original Reporter's Transcript of proceedings on December 29, 1949, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $4.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 8th day of June, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12572. United States Court of Appeals for the Ninth Circuit. John D. Ross, Sheriff of Santa Barbara County, California, Appellant, vs. Sylvester Middlebrooks, Jr., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 9, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12572

JOHN D. ROSS, Sheriff Santa Barbara County, California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.

Appellee.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit.

Will you please take notice that John D. Ross, appellant in the above-entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain decision of the United States District Court, Southern District of California, Central Division, including all findings of fact, all conclusions of law, and judgment and order filed in the office of the Clerk of said Court on or about May 2, 1950, discharging the appellee, Sylvester Middlebrooks, Jr., from the custody of the appellant John D. Ross, Sheriff of Santa Barbara County, California, and from each and every part of said decision, findings of fact, conclusions of law, judgment and order, as well as from the whole thereof, and the appellant John D. Ross

hereby requests and designates that there shall be made up and printed on this appeal the entire record of all proceedings and all matters relating to the above-entitled cause, excluding, however, (1) the proposed findings of fact and conclusions of law submitted by petitioner (appellee herein), (2) the proposed judgment of petitioner (appellee herein) and (3) disapproval and objections of respondent (appellant herein) to petitioner's proposed findings of fact and conclusions of law and judgment.

Dated this 16th day of June, 1950.

/s/ DAVID S. LICKER,

District Attorney of the County of Santa Barbara.

/s/ VERN B. THOMAS,

Assistant District Attorney of the County of Santa Barbara.

Attorneys for Appellant John D. Ross, Sheriff of Santa Barbara County, California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 17, 1950.

[Title of Court of Appeals & Cause.]

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Comes now the above-named appellant and presents a statement of the points upon which he intends to rely on the appeal of the above-entitled cause.

Introduction

The Governor of Georgia invoked into operation the provisions of Art. IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress Regulating Interstate Extraditions, by making a demand on the Governor of California for the arrest of Sylvester Middlebrooks, Jr., as a fugitive from Justice from the State of Georgia. Such demand was made in the form and manner required by such designated provisions. The Governor of California thereupon issued a fugitive warrant for the arrest of Sylvester Middlebrooks, Jr. The Sheriff of Santa Barbara County thereupon took and held in custody the appellee-petitioner, Sylvester Middlebrooks, Jr., under and by virtue of such fugitive warrant issued by the Governor of California.

Subsequently, appellee-petitioner filed successive petitions for a writ of habeas corpus in the Superior Court of the State of California in and for the County of Santa Barbara, and in the District Court of Appeals of the State of California, and in the Supreme Court of California, all of which were

denied. Appellee-petitioner then filed a petition for a writ of habeas corpus in the District Court of the United States of America, Southern District of California, Central Division. The case came on for hearing before the Honorable James Carter, District Judge, on the 20th day of December, 1949. The court took the matter under submission and thereafter, on February 3, 1950, rendered its decision and directed appellee to submit judgement and findings. On May 2, 1950, the District Court approved findings and rendered a judgment in favor of the appellee-petitioner and against the appellant-respondent, John D. Ross, Sheriff, Santa Barbara County, California, and ordered the discharge of the appellee-petitioner from the custody of the appellant. Error was committed by the District Court of the United States of America, Southern District of California, Central Division, in discharging the appellee-petitioner from custody in the respects hereinafter set forth:

I.

The District Court erred in hearing and determining in the asylum state and constitutional validity of phases of the penal action by the demanding state in respect to the fugitive and his offenses.

1. The scope of inquiry in a petition for a writ of habeas corpus, in cases having an extradition base, is limited, under provisions of Art. IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress Regulating Interstate Ex-

traditions (Section 3182 of Title 18, U. S. C.), to the following questions: (a) whether the person demanded has been substantially charged with crime and (b) whether he is a fugitive from justice of the demanding state.

The petition for a writ in the instant case, filed by appellee-petitioner, requests relief, on the other hand, not within the permissible scope of inquiry, but on the alleged principle grounds:

(1) That appellee-petitioner was denied assistance of counsel in the courts of the demanding state, Georgia (paragraph II, subd. (1) (a), pgs. 1 and 2 of the petition).

(2) That there were alleged violations of constitutional rights in connection with his commitment and conviction for burglary offenses in the demanding state (paragraph II subds. (1) (a), pgs. 1, 2 and 3 of the petition).

(3) That he had sustained cruel and unusual punishment while incarcerated on such judgment of conviction and that he would be subjected to cruel and unusual punishment if returned to the demanding state (paragraph II subds. Nos. 3, 4, and 5; and paragraph I subd. (2) at pg. 5 of the petition).

(4) And, that, hence, the fugitive warrant issued by the Governor of California upon demand of the Governor of Georgia was null and void and violated the Due Process Clause of the Fourteenth Amendment of the United States (paragraph II subd. (3) pg. 5 of the petition).

The judgment of the court releasing the appellee-petitioner from custody on the grounds outlined above and as set forth in the petition was contrary to law by reason of the court's non-acceptance and violation of the principle of limiting the scope of inquiry for extradition purposes. The appellant, Sheriff Santa Barbara County, State of California, held the appellee-petitioner in custody in conformity with the requirements of Art. IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress Regulating Interstate Extraditions (Section 3182 of Title 18, U. S. C.).

2. The District Court, Southern District of California, Central Division, erred in overruling the motion of appellant that the petition for a writ of habeas corpus did not state facts sufficient to constitute a cause of action against the appellant-respondent, Sheriff of Santa Barbara County, California, by reason of the failure of said District Court to recognize the principle limiting the scope of inquiry for extradition purposes. (See paragraph 4, page 2 of the return by the appellant and an oral motion raising this issue, lines 14 to 20 inclusive, pg. 17 of the Reporter's Transcript.)

3. The District Court, in the habeas corpus hearing, likewise, erred in overruling appellant's objections to the introduction of all testimony and evidence offered and received on behalf of appellee-petitioner (pgs. 19 to 103 inclusive, of the Reporter's Transcript). Appellant's objection to the testimony of Sylvester Middlebrooks, Jr., is reported at page

19 of the Reporter's Transcript, lines 19 to 24, appellant's objection to the testimony of Horace B. Conkle is reported at page 71 of the Reporter's Transcript. Similarly, motions to strike were made on behalf of the appellant, pages 69 and 92 of the Reporter's Transcript. Such objections to the admission of testimony and evidence were taken under submission by the court as also were motions to strike such testimony and other evidence. In paragraph 15 of the court's conclusions of law, page 9, the court overruled all such objections and motions to strike made by appellant. The court thereby erred by its failure to recognize the principle limiting the scope of inquiry applicable to extradition cases.

4. The non-acceptance and violation of the scope of inquiry rule is also the basis of appellant's position that the court erred in the following designated findings of fact, paragraphs numbered 2, 3, 4, 5, 6, 8 and 12, appearing on pages 1 to 6 of the court's findings of fact; and the court also erred in the following designated conclusions of law, paragraphs numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, appearing on pages 6 to 9 inclusive. For explanatory purposes and brevity, each and all of such designated findings of fact and conclusions of law fall within inquiries not permissible for testing an asylum state's arrest and detention for extradition purposes under the provisions of Art. IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress Regulating Interstate Extraditions (Section 3182, U. S. C.).

II.

The District Court erred in determining that the appellee-petitioner for a writ of habeas corpus based upon alleged deprivation of constitutional rights in the demanding state, need not exhaust the remedies of the demanding state.

The appellee's petition for a writ of habeas corpus fails to allege the exhaustion of any remedies of the State of Georgia, the demanding state, nor was there attempted to be shown during the trial the exhaustion of such remedies or that there was an absence of corrective process in that state. The trial court, on the other hand, made a determination that the appellee need not have exhausted his remedies in the State of Georgia. (See part VII of the opinion of the court filed February 3, 1950, and incorporated as a conclusion of law of the court by Section 14 of the court's conclusions of law as if set forth haec verba.)

The District Court erred in holding that the appellee need not have exhausted the remedies of the State of Georgia.

The District Court further erred in this connection in finding that there were extraordinary circumstances existing sufficient to justify federal inquiry into the merits without the exhaustion of remedies of the State of Georgia. Hence, also on this specific ground the court erred in overruling appellant's motion to dismiss the writ on the ground that the petition for a writ did not state facts sufficient to constitute a cause of action, overruling ap-

pellant's objections to the introduction testimony in evidence on behalf of appellee, and overruling appellant's motion to strike such testimony and evidence.

III.

The District Court erred in determining that it was not necessary for appellee-petitioner to apply for writ of certiorari to the Supreme Court of the United States after denial of the writ of habeas corpus by the Supreme Court of California.

Appellee-petitioner was refused relief on a petition for a writ of habeas corpus by a judgment of the Supreme Court of California. Appellee failed to file a petition for certiorari to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California refusing relief.

The trial court in the instant case in its findings of fact, paragraph 9, and paragraph 1 of the conclusions of law, finds that appellee had exhausted all remedies available to him in the courts of the State of California, notwithstanding the failure to file a petition for a writ of certiorari to the United States Supreme Court.

The District Court likewise erred in finding the existence of any exceptional circumstances in the case which would have rendered it unnecessary for the appellee to file a petition for certiorari to the United States Supreme Court from the denial of relief on habeas corpus by the Supreme Court of the State of California.

IV.

The District Court erred in nullifying the provisions of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress Regulating Interstate Extraditions by determining in the asylum state that a fugitive has been deprived of constitutional rights under the Fourteenth Amendment in the demanding state.

The fugitive warrant issued by the Governor of the State of California for the arrest of appellee as a fugitive from justice was issued pursuant to the receipt from the Governor of the State of Georgia, in the form and manner provided by Art. IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress Regulating Interstate Extraditions (Section 3182 of Title 18, U. S. C.). The District Court, on the other hand, upon the basis of non-acceptance of the scope of inquiry test then proceeded in paragraph 2 of the conclusions of law to construe the action of the Governor of the State of California in issuing the warrant as state action by the State of California within the meaning of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. In paragraph 3 of the conclusions of law the court construes also the action of the Governor of the State of California in issuing the warrant as action by the State of California for the purpose of effectuating the judgment and sentence of the Superior Court of Bibb County, State of Georgia, and that thereby the State of California became an ac-

tive participant in the effectuation of said judgment and sentence. In paragraphs 4 to 8, inclusive, of the conclusions of law the court determines that there were deprivations of constitutional rights of the appellee in the demanding state and that the judgments and sentences of the court of the demanding state were void. By paragraph 9 of the conclusions of law the action of the State of California is held to be void and without jurisdiction. Likewise, in paragraph 11 the action of the Governor of the State of California in issuing the warrant is construed as action of the State of California which was void and without jurisdiction, in that it deprived appellee of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. Likewise, in paragraph 12 of the conclusions of law the custody of appellee by appellant Sheriff is construed as void and without jurisdiction. In part 5 of the court's opinion incorporated as a conclusion of law by paragraph 14 of the conclusions of law as if set forth in haec verba, the due process clause of the Fourteenth Amendment of the Constitution of the United States is construed as prevailing over the provisions of Art. IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress Regulating Interstate Extraditions (Section 3182 of Title 18, U. S. C.). The judgment of the District Court nullifies the operating effectiveness of Art. IV, Section 2, Clause 2 of the Constitution of the United States,

and the Act of Congress Regulating Interstate Extraditions (Section 3182 of Title 18 U. S. C.).

V.

The District Court erred in nullifying the provisions of the California Uniform Extradition Act (Penal Code Sections 1548.2, 1549.2, 1549.3, and 1553.2) by determining that a Federal District Court in California may declare that a fugitive from the State of Georgia has been deprived of constitutional rights under the Fourteenth Amendment in the State of Georgia.

Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of the State of California, which are provisions of the Uniform Extradition Act in force and effect in over half of the States of the Union are adversely affected by the ruling of the District Court to the extent that the operative effectiveness of such named provisions are nullified by the holding of the Court that such statutes were operative against appellee-petitioner, Sylvester Middlebrooks, Jr., for unconstitutional purposes and with unconstitutional results and in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States (See Part 5 of the court's opinion, incorporated as a conclusion of law in paragraph 14 of the conclusions of law as if set forth haec verba.) The court thereby erred in discharging the appellee from the custody of the appellant who held the appellee in custody in con-

formity with the requirements of the Uniform Extradition Act.

Dated this 16th day of June, 1950.

/s/ DAVID S. LICKER,
District Attorney of the
County of Santa Barbara.

/s/ VERN B. THOMAS,
Assistant District Attorney of the County of Santa Barbara.

Attorneys for Appellant John D. Ross, Sheriff of Santa Barbara County, California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 17, 1950.